(22,778 and 22,779.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 702.

JOHN A. KNOTT, H. R. OGLESBY, AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

vs.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

No. 703.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, APPELLANT,

vs.

JOHN A. KNOTT, H. R. OGLESBY, AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY GENERAL OF THE STATE OF MISSOURI.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

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a *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Chicago, Milwaukee and St. Paul Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at the City of Washington, within thirty days from the date of this writ, pursuant to an appeal duly allowed by the Circuit Court of the United States for the Western Division of the Western District of Missouri, and filed in the clerk's office of said court on the 15th day of March, A. D. 1911, in a cause wherein John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad and Warehouse Commissioners, and Elliott W. Major, Attorney General of the State of Missouri, are appellants, and you are appellee, to show cause, if any, why the amended final decree rendered against the said appellants, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Smith McPherson, Judge of the Circuit Court of the United States for the Western Division of the Western District of Missouri, this 15th day of March, A. D. 1911.

SMITH McPHERSON, *Judge.*

THE UNITED STATES OF AMERICA,
Western District of Missouri, ss:

I hereby acknowledge due service of the above citation this 15th day of March, A. D. 1911.

FRANK HAGERMAN,
Solicitor for Chicago, Milwaukee and St. Paul Railway Company, Appellee.

b [Endorsed:] 3004. C., M. & St. P. Ry. Co. vs. John A. Knott et al. Citation. Filed Mar. 15, 1911. Adelaide Utter, Clerk.

c In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Complainant,
vs.
JOHN A. KNOTT, H. R. OGLESBY, and FRANK A. WIGHTMAN, Railroad Commissioners, et al., Defendants.

The President of the United States to all the defendants of record in above entitled case:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the city of Washington, Dis-

POOR COPY

trict of Columbia, within thirty days from the date of this writ, pursuant to an appeal duly allowed by the circuit court of the United States for the western division of the western district of Missouri, on March 15, 1911, as a cross appeal in a case where the Chicago, Milwaukee & St. Paul Railway Company is cross appellant and you are the cross appellees, and show cause, if any, why the amended final decree rendered against the said appellant as in the said appeal mentioned should not be granted, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Smith McPherson, Judge of the Circuit Court of the United States for the Western Division of the Western District of Missouri, this March 15, 1911.

SMITH McPHERSON, *Judge.*

Due service of above citation accepted this March 15th, 1911.

ELLIOTT W. MAJOR,
SANFORD B. LADD,
Solicitors for Appellees and Defendants in said Cause.

d [Endorsed:] No. 3004. C., M. & St. P. Ry. Co. v. Jno. A. Knott, et al. Citation. Filed March 15, 1911. Adelaide Utter, Clerk.

1 UNITED STATES OF AMERICA, *sct:*

Be it remembered, that heretofore, to-wit, on the 17th day of June, A. D. 1905, there was filed in the office of the clerk of the Circuit Court of the United States, for the Western Division of the Western District of Missouri, a bill of complaint wherein Chicago, Milwaukee & St. Paul Railway Company is complainant and John A. Knott, et al., are defendants.

Said bill of complaint is in words and figures as follows:

2 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Complainant,
vs.
JOHN A. KNOTT, JOSEPH P. RICE, and FRANK A. WIGHTMAN, Railroad Commissioners of the State of Missouri; Herbert S. Hadley, Attorney General of the State of Missouri; George Rodus, Frank E. Craig, and Robert Keith Furniture Company, a Corporation, Defendants.

Bill of Complaint.

To the Honorable the Judges of the Circuit Court aforesaid:

Your orator, the Chicago, Milwaukee & St. Paul Railway Company, brings this its bill of complaint against each of the above named defendants, and thereupon avers:

I.

Your orator, the Chicago, Milwaukee & St. Paul Railway Company is a railway corporation organized and existing under the laws of the State of Wisconsin, with its chief offices therein, and is a citizen and resident thereof, being authorized to do business in the State of Missouri. It is with its railroad engaged in state and interstate commerce, owning and operating lines of railway in Missouri and other states. Of the said lines, the following are, and have been for a long time owned and operated by your orator in the State of Missouri: A line of railroad extending from a point about two and one-half miles north of Powersville, in Putnam County, to Kan-
3 sas City, in Jackson County, running through the counties of Sullivan, Grundy, Livingston, Caldwell, Ray and Clay, a distance of one hundred forty and 27/100 miles, more or less.

II.

This cause arises under the constitution and laws of the United States, for that it seeks to enjoin the enforcement and adoption as against your orator of the provisions, requirements and prohibitions in the act of the legislature of Missouri mentioned in paragraph VII hereof (hereinafter called the Act of 1905); said act being unconstitutional, violative of the provisions of the constitution of the United States and the amendments thereto, and contrary to the laws of the United States, all as hereinafter more particularly stated. The matter and amount in dispute exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars.

III.

The defendants, John A. Knott, Joseph P. Rice and Frank A. Wightman constitute the duly elected and qualified Board of Railroad Commissioners of the State of Missouri, and are citizens and residents respectively of Marion County, City of St. Louis and Barry County, therein, their statutory official residence being in Cole County in said State. The defendant Herbert S. Hadley is Attorney General of the State of Missouri, and is a citizen and resident of Cole County therein. Each of said parties is by the law of which the Act of 1905 is a part, required to do and perform the special duties hereinafter mentioned.

IV.

The defendants George Rodus and Frank E. Craig, each of whom is a citizen and resident respectively of the counties of Ray and Caldwell, Missouri, and Robert Keith Furniture Company, which is a corporation organized under the laws of Missouri, and has it principal office and place of business in Kansas City, Jackson County, Missouri, are herein designated as shippers, each being a per-
4 son engaged in shipping over your orator's road and other roads in the State to and from points therein, the commodities, the rates of which are attempted to be limited by the Act of

1905. These defendants represent a class of shippers so numerous that it is impracticable to attempt to join them all and the above named defendants are made parties hereto for the purpose of determining the rights as against your orator, of all the shippers under said Act of 1905.

V.

Article IV of Chapter 12 of the Revised Statutes of Missouri, 1899, of which the Act of 1905 has become a part, made provision for the classification of railroads and freights and provision for maximum rates. Sections 1191, 1192 and 1193 thereof provide as follows:

SEC. 1191. Roads Classified.—All railroads in the State of Missouri are hereby divided into three classes, to be known as class A, class B and class C. Class A shall include all through or trunk line railroads. Class B shall include all of the branch roads owned, leased or occupied by such through or trunk line railroad companies or corporations. Class C shall include all other railroads or parts of railroads owned, leased, or occupied, or which may hereafter be owned, leased or occupied in this state, either wholly or in part."

"SEC. 1192. Passenger Charges Regulated.—Any individual, company or corporation owning, operating, managing or leasing any railroad or part of a railroad in this state, in the several classifications as herein prescribed, shall be limited to a compensation per mile for the transportation of any person with ordinary baggage not exceeding one hundred pounds in weight, as follows: In class A, not exceeding three cents per mile, and in classes B and C not exceeding four cents per mile; provided, that no such individual, company or corporation shall charge, demand or receive any greater compensation per mile for the transportation of children of the age of twelve years or under than one-half of the rate above prescribed; and provided further, that the rates for transportation herein prescribed may be reduced, as hereinafter provided."

5 "SEC. 1193. Freight Classified.—All freights hereafter transported upon any railroad or part of a railroad in this state are hereby divided into four general classes, to be designated as first, second, third and fourth classes, and into seven special classes, to be designated as Class- D, E, F, G, H, I and J. Class D shall comprise all grain in carloads. Class E shall comprise flour in lots of fifty barrels or more, and lime in lots of twenty-four barrels or more. Class F shall comprise salt in lots of sixty barrels or more, and cement, water-lime and stucco in lots of twenty-four barrels or more. Class G shall comprise lumber, lath and shingles, in carloads. Class H shall comprise livestock in carloads. Class I shall comprise agricultural implements, furniture and wagons. Class J shall comprise coal, brick, sand, stone, railroad ties and cordwood, and all heavy fourth-class articles, in carloads; and in addition to the several articles, in the said special classes, shall be added other articles as and in the manner hereinafter prescribed, except in classes D, E, G and H; and all articles not before enumerated or subsequently set into said classes as hereinafter provided, shall be placed in and be-

long to the four general classes, to be classified by the railroad commissioners hereinafter to be provided."

Section 1194 fixed the maximum rates for the seven special classes of feight designated as classes D, E, F, G, H, I, and J, respectively.

The statutes of the state also provide for the election and qualification of the railroad commissioners aforesaid, and prescribe their special duties, among which special duties in relation to the adoption and enforcement of the said Act of 1905 are these: To require to be posted by each railroad company in the state in its depot or railroad station and to be filed in the office of the railroad commissioners, a schedule of rates to be charged, which in no event must exceed the maximum rates at any time fixed by law, nor those maximum rates fixed by the Act of 1905, which rates so shown by the schedules so filed with the railroad commissioners cannot
6 be advanced except after ten days' public notice plainly stating the changes proposed to be made in the schedule, and the time when said changes will go into effect; to require to be likewise filed and published all joint tariff arrangements with other common carriers; to see that all such schedules of rates are observed by all common carriers; if and when the common carrier shall neglect or refuse for thirty days to file or publish its schedule as aforesaid, as commissioners to make out and print such schedule for such carrier, delivering to it a copy thereof which shall be likewise posted in the depots and stations; to enforce statutory provisions imposing severe penalties for a failure to publish and file said schedule; to hear all complaints made by any person for a violation of any of said provisions of law, as well as to institute on its own motion any such complaint. The statute of the state also especially provides for the adoption and enforcement of the provisions of the Act of 1905 by requiring the prosecuting attorney of each county to prosecute any carrier violating the provisions of the law aforesaid whenever directed by the railroad commissioners, receiving for his services compensation equal to the amount allowed by law on forfeited recognizances, and the attorney general is required to assist in such prosecution and to prosecute other cases whenever directed by the railroad commissioners.

VI.

The legislature of the State of Missouri in 1903 passed an act, herein called the Act of 1903, reading as follows:

"SECTION 1. That chapter 12 of article 4 of the Revised Statutes of Missouri of 1899 be and the same is hereby amended by adding thereto two new sections, to be between sections 1194 and 1195 of said chapter, to be known as sections 1194*a* and 1194*b*, providing for the fixing, modifying and enforcing freight rates as follows:

"SECTION 1194*a*. The board of railroad and warehouse commissioners are hereby authorized, empowered and required to fix, maintain and establish just and reasonable freight rates on all classes of freight, from, to and between all points and stations upon and
7 along all lines of railroads in this state; and said board is authorized and empowered to reduce, change or modify

any and all such freight rates so fixed and established, as hereinafter provided. And said board may, of its own motion, and shall, upon the sworn complaint of any shipper, mayor, councilman, alderman or trustee of any city, town or village, first giving five days' written notice to the railroad company affected, or complained against, proceed to fix, establish, modify or reduce the freight rates or charges of any such road from, to or between any and all points or stations in Missouri; and any and all orders fixing, establishing, modifying or reducing any such freight rates or charges shall be the judgment of said board and constitute the legal rates or charges that such railroad company may collect for the transportation of freight from, to and between its stations in Missouri; and said board shall, immediately upon the fixing, establishing, modifying or reducing the freight rates or charges of any railroad company, notify such railroad in writing thereof; and said railroad shall comply with the orders and judgments of said board with reference to such freight rates or charges within ten days after such notice. And if any railroad fails, refuses or neglects to put the rates so ordered by said board into effect and operation within ten days after notice the board shall submit a certified copy of its order to the attorney general of the state with notice that such railroad (designating the same) has failed to comply therewith. And the attorney general, upon receipt thereof, shall immediately institute suit in the name of said board of railroad and warehouse commissioners against such railroad in the supreme court of the state, by mandamus or other proper remedy, to enforce said order of said board.

"SEC. 1194*a*. All railroad companies doing business in this state shall, upon the request of the board of railroad and warehouse commissioners, furnish to said board copies of all its sched-
8 ules of freight rates and charges, and all other papers and documents, including bills of lading and contracts for transportation of freight affecting in any way the transportation of freight within, into and from this state. And said board shall have full power and authority to examine all officers, agents and employés of said railroad companies, and all other persons, under oath or otherwise, to procure the necessary information to make just and reasonable freight rates or charges. And to ascertain if the freight rates so fixed by said board are being observed or violated. And said board shall have power to administer oaths, to issue subpœnas for persons and papers, examine witnesses and to enforce the same in like manner as the circuit courts of this state. And in the issuance and enforcement of the papers and process above the jurisdiction shall be co-extensive with the state.

"Approved April 6, 1903."

There *was* then and there adopted sections 1194*a* and 1194*b* to become part of article 4 of chapter 12 of the Revised Statutes of Missouri, 1899, to be known as sections 1194*a* and 1194*b*, and to be inserted between sections 1194 and 1195 of the said Revised Statutes.

VII.

The legislature of the State of Missouri, at its session of 1905, passed the act herein called the Act of 1905, reading as follows:

"SECTION 1. That section 1194 of the Revised Statutes of Missouri, 1899, concerning the regulation of freight charges, being part of article IV, of chapter 12, entitled "Corporations, private," be and the same is hereby repealed and the following, to be known as sections 1194, 1194*a*, 1194*b*, of said Revised Statutes, be enacted in lieu thereof, so that said sections shall be collocated between existing sections 1193 and 1195 of said Revised Statutes of 1899.

"SEC. 1194. No individual, company or corporation owning, operating, managing or leasing any railroad or part of railroad, designated in Section 1191 as in Classes A, B, or C shall demand, charge or receive a greater or higher rate for carrying from initial to terminal points in this state articles named in the several classes herein designated, than is hereinafter provided for, namely: Class D, in carloads of 40,000 pounds minimum weight, not exceeding 5 cents per 100 pounds for the first twenty-five miles and not exceeding one-half cent per 100 pounds for the second twenty-five miles, or fractional part thereof, and not exceeding one-half cent per 100 pounds for each additional twenty-five miles or fractional part thereof. Class E, in carloads of 24,000 pounds minimum weight not exceeding 5 cents per 100 pounds for the first twenty-five miles and not exceeding one-half cent per 100 pounds for the second twenty-five miles, or fractional part thereof, and not exceeding one-half cent per 100 pounds for each additional twenty-five miles or fractional part thereof. Class F in carloads of 30,000 pounds minimum weight, not exceeding 5 cents per 100 pounds for the first twenty-five miles, and not exceeding one-half cent per 100 pounds for the second twenty-five miles, or fractional part thereof, and not exceeding one-half cent per 100 pounds for each additional twenty-five miles or fractional part thereof. Class G, in carloads of 30,000 pounds minimum weight, not exceeding 5 cents per one hundred pounds for the first twenty-five miles, and and not exceeding one-half cent per 100 pounds for the second twenty-five miles, or fractional part thereof, and not exceeding one-half cent per 100 pounds for each additional twenty-five miles or fractional part thereof. Class H, in carloads in common cars, measuring inside from twenty-nine feet to and including thirty feet and six inches in length (to be known as standard cars) not exceeding $6.00 per carload for the first twenty-five miles, and not exceeding $3.00 per carload for the second twenty-five miles, or fractional part thereof, and not exceeding $2.00 per carload for each additional twenty-five miles or fractional part thereof of over twelve miles. For the carriage of any of the articles comprising Class H in cars of other lengths for the distances above specified, the following percentages of the foregoing rates per car load shall not be exceeded, namely: In cars of length less than twenty-nine feet, 94 per cent; in cars of length over thirty and one-half feet to and including thirty-two feet, 104 per cent; in cars of

length over thirty-two feet to and including thirty-three feet and nine inches, 107 per cent; in cars of length over thirty-three feet and nine inches to and including thirty-six feet, 110 per cent; in cars of length over thirty-six feet to and including thirty-eight feet, 113 per cent; in cars of length over thirty-eight feet to and including forty feet, 116 per cent; in cars of length over forty feet to and including forty-two feet 125 per cent; in cars of length over forty-two feet to and including forty-four feet, 135 per cent; in cars of length over forty-four feet, 140 per cent of the rates herein specified for cars of the standard length of twenty-nine feet to and including thirty feet and six inches, shall not be exceeded. All the foregoing lengths to be taken by inside measurements. Class I, in carloads of 20,000 pounds minimum weight, not exceeding $14.00 per carload for the first twenty-five miles and not exceeding $2.00 per carload for the second twenty-five miles, or fractional part thereof, and not exceeding $2.00 per carload for each additional twenty-five miles, or fractional part thereof. (Class.) In computing the rate of freight according to the provisions of this article, the distance shall be computed from the point where it is received to the point of destination in the state, notwithstanding it may pass from one road to another."

11 "SEC. 1194*a*. That for the violation of the foregoing sections the railroad company so offending shall forfeit and pay to any person thereby affected the freight rate charged, demanded, or received in excess of the rates prescribed in said section, together with all actual damages caused thereby to be recovered in any court having jurisdiction thereof by the existing law. And (if) the plaintiff in such action recover judgment therein, the court shall treble the same and the plaintiff shall on motion be allowed a reasonable attorney's fee for bringing the action."

SEC. 1194*b*. All acts and parts of acts, and all rules and regulations, freight schedules, classifications and groupings by railroad companies or the railroad and warehouse commissioners of this state in conflict with the provisions of this act are hereby repealed and declared void."

"Approved, April 15, 1905."

Said act will, under the constitution of the State of Missouri, take effect on the 16th day of June, 1905, which will be ninety days after the adjournment of the session of the legislature at which the act was passed. The rates now being lawfully charged by your orator for the transportation of freight of the character mentioned in said act, are shown in schedules now on file with the railroad commissioners and posted in your orator's depots and railroad stations, and are far in excess of the maximum rates fixed in said act of 1905, so that when said act becomes effective, if permitted to be enforced, it will require such a reduction in your orator's said rates as to make imperative a change in the said schedule, which change your orator does not propose to make, and cannot make without jeopardizing its property interests. The railroad commissioners propose and threaten to and will, unless enjoined herein enforce the

the special provisions of the statute of the state for the enforcement of said act of 1905, by entering upon investigations, both upon its own instigation and upon the complaint of shippers, and by determining and adjudging your orator's present schedule of rates posted and filed as aforesaid, to be unreasonable, unjust
12 and extortionate for the sole reason that rates are higher than those prescribed by the act of 1905, and by requiring under the pain of large penalties threatened to be enforced, your orator to file and publish a new schedule, fixing rates not in excess of those mentioned in said act of 1905. Besides which, said Railroad Commissioners propose, as specially required by law, to file, post and publish as your orator's said schedule, the maximum rates fixed in said act, if and when your orator refuses so to do, and they propose to direct each of the prosecuting attorneys in each of the counties through which the line of your orator's road runs, to prosecute and recover of your orator the large and excessive penalties provided by law, and to direct the defendant attorney general to assist in such prosecutions and to direct the defendant attorney general to prosecute your orator and recover the penalties provided by law, for its failure to comply with the orders which the Railroad Commissioners propose from time to time to make in investigations instituted for the enforcement of said act of 1905, by compelling your orator to adopt a rate in acordance therewith, said prosecuting attorneys and attorney general will, unless restrained herein, conduct said prosecutions and seek to recover said penalties.

The shippers along the lines of your orator's railroad are very numerous, and are daily engaged in making and receiving shipments to and from points in Missouri, of freight of the special classes designated in the act of 1905, so that unless restrained by this court there will be instituted by them a multiplicity of suits to recover of your orator treble damages, together with attorney's fees in each case. Said parties being so numerous, and the causes of action which will accrue, so many, if the Act of 1905 be enforced, it is not practicable to make more than part of said shippers defendants hereto, but all other shippers in the counties in the State where your orator's line of road extend, are likewise interested with those named as defendants herein, so that such as are named as such defendants should defend for all those having like interest, any such omitted party being permitted to become a defendant herein if so desired, to the end that all persons having a like interest
13 will be bound by the decree to be entered herein, and the court have an opportunity to determine once for all the validity of said act of 1905.

VIII.

Said Act of 1905 is invalid and inoperative, and of no force or effect, for each of the following reasons:

(*a*) It fixes rates confiscatory in their nature, unreasonable in amount, insufficient to permit your orator to operate its property in Missouri without loss, making it impossible for freight to be carried

by your orator between points in Missouri at any profit, all of which is contrary to and violative of the provisions of the Constitution of the United States, and particularly of the fourteenth amendment thereto, prohibiting the taking of property without due process of law, and guaranteeing to all persons equal protection of the law.

(*b*) It is invalid as alleged in paragraph- XII and XIII hereof, whereby it is violative of said amendments to the Constitution of the United States.

(*c*) It provides that in computing the rate of freight the distance shall be computed from the point where it is received to the point of destination in the state, notwithstanding it may pass from one road to another. This impairs your orator's freedom of contract and fixes a rate for it based upon carriage over the line of another road, whereby the provisions of the Federal Constitution and the amendments thereto hereinbefore referred to are violated, and the freedom of contract, guaranteed by section 4, article II of the state constitution, denied.

14 (*d*) It provides in Section 1194, that no individual, company or corporation owning, operating, managing or leasing any railroad or part of railroad designated in section 1191 as in classes A, B, or C, shall demand, charge or receive a greater or higher rate for carrying from initial to terminal points in this State, articles named in the several classes therein designated than as therein provided for, but it also provides in Section 1194*a* that the only penalty for a violation of the act shall be enforced only against railroad companies, thereby exempting individuals from such penalties. This is a discrimination between individuals and companies, and denies to your orator the equal protection of the law, guaranteed it by the fourteenth amendment to the Constitution of the United States, and,

(*e*) It attempts to adopt and create as part of Article 4 of chapter 12 of the Revised Statutes of Missouri 1899, two sections called sections 1194*a* and 1194*b*, when the act of 1903 adopted sections so numbered as part of the same article and chapter. There was by the Act of 1905, no repeal nor attempted repeal of said Act of 1903. The Act of 1905 cannot be treated as amendatory to the Act of 1903 because it is insufficient, since it does not in anywise comply with the provisions of section 34, article 4 of the Constitution of the State of Missouri. The Act is, therefore, invalid because the law as it now stands is uncertain, there being two separate enactments upon two different subjects designated as sections 1194*a* and 1194*b* of article 4 of chapter 12 of the Revised Statutes of 1899.

15 IX.

Your orator has in its entire system about 7,000 miles of railroad, and in acquiring and constructing said system, it has expended large sums of money for right of way, ties, iron, grading, bridging, equipment, and for all the facilities and appliances necessary for the operation of a railway, and it has, at great cost acquired terminals and terminal facilities at various cities and towns to and through which its system extends. All of said railway, including that portion in

Missouri, was constructed and fairly acquired at a fair and reasonable cost; it was judiciously located, and has at all times been properly and economically operated. Its capitalization in bonds and stocks aggregates $33,253.23 per mile for its entire system, which capitalization is fair and reasonable and less than the amount for which said road could be reproduced. Its fixed charges are no more than would be required to produce and acquire the property, its equipment, facilities and terminals. All the lines in Missouri secure and receive a due, fair and reasonable proportional benefit of the entire system, and the value of the property in Missouri as well as its capacity for serving the public, is proportionately increased and augmented thereby. The cost of constructing and replacing said railroad in Missouri and providing and furnishing its equipment and terminals, as well as constructing and replacing its entire system today would largely exceed the original cost. Upon the value of the property of your orator, it has only been able in the past to have any kind of returns, because it was operated as part of a whole system. The said rates fixed in said Act of 1905 are unjust, unfair and unreasonable.

X.

The rates now charged by your orator for state shipments of the classes of freight mentioned in the act of 1905 are in excess of the maximums therein fixed. If, for the classes of freight mentioned in the Act of 1905, charges should be by your orator made at the
16 maximum rates therein fixed for state shipment, your orator would be required to do such business not only without profit, but at a loss and without any return upon its investment in this state. Such rates in said act of 1905 mentioned are unjust, unreasonably low, confiscatory in their nature and will not make any return upon the investment in the property of your orator in this state. Taking the gross receipts of all the state business of whatsoever kind which your orator does, can or will do in Missouri when charging the maximum rates fixed by the act of 1905 for the classes of freight therein mentioned, and deducting from the total receipts the cost of doing such business in the state, there will not be sufficient to pay operating expenses, and there will not be left any sum as profit or as a return upon the value of the property of your orator devoted to the use of such business in the state. The maximum rates for each class of freight mentioned in the Act of 1905 are not sufficient to pay the cost of carriage thereof.

XI.

The total earnings of your orator from local and state business in Missouri for the last three years were not in excess of: For the fiscal year ending in 1902, $982,118.01; 1903, $873,632.46; 1904, $1,181,602.00.

The expenses of doing such local and state business for said three years were so great that the net receipts do not represent a fair return on the investment of your orator in said State of Missouri.

The reduction in rates under said Act of 1905 will not increase the local traffic and the volume of state and local business will not be more in 1905 than it was in 1904, while the expense of doing such business will be as great, and if in the future said business increases there will be a proportional increase in said expenses.

If, for the class of freight mentioned in the Act of 1905, your orator should charge the maximum rates therein fixed, its total gross receipts from local or state traffic in Missouri will be much
17 less, and its expenses will not be lessened, which makes the attempted reduction in both gross and net receipts unfair and unjust and fails to give a fair return upon the investment in your orator's said property, or upon the fair value of the same used in carrying on such local or state business, and the enforcement of said act will compel your orator to do its local and state business in such a way as not to permit it to make a fair and reasonable profit thereon.

XII.

There are in this state carrying therein the classes of freight mentioned in said act, and hence affected thereby, the following companies owning lines of railroad:

Chicago, Burlington and Quincy Railway Company, Chicago, Rock Island and Pacific Railway Company, Missouri Pacific Railway Company, St. Louis and San Francisco Railway Company, Missouri, Kansas and Texas Railway Company, Chicago and Alton Railway Company, Chicago, Milwaukee and St. Paul Railway Company, Wabash Railroad Company, Kansas City Southern Railway Company, St. Louis Southwestern Railway Company, Chicago Great Western Railway Company, St. Joseph and Grand Island Railway Company, St. Louis and Hannibal Railway Company, Mississippi River and Bonne Terre Railway Company, Illinois Southern Railway Company and Kansas City, Springfield and Southern Railway Company.

Each and all of said companies claims that the maximum rates fixed by said Act of 1905 are confiscatory in their nature, and if charged would result in said company doing its state business without any profit, which, as a fact, is true. Each of said companies has filed or will at once file a bill similar to that now presented by your orator. Even if in this cause it should be held that such maximum rates should be valid as against your orator, yet as a matter of fact, same are unreasonably low as against each of said other companies and will not permit either of said companies to make a profit upon its state business, and therefore said act is invalid as against said com-
18 pany. This being true, the act, even if held valid as to your orator, is unconstitutional because it would thereby become discriminatory in that it would not apply alike to all persons or corporations operating railroads in this state, whereby the provisions of the constitution of the United States and the amendments thereto hereinbefore mentioned are violated.

XIII.

Said Act of 1905 fixes and establishes maximum rates which are unjust, unreasonable and unconstitutional in this: the cost of trans-

porting livestock is greater than that of any of the other commodities in which a reduction is made, yet said act reduces the rate thereon on an average of about fifty per cent., while the reduction in rates on salt is about thirty-three per cent., and on cement is only about fourteen per cent. The different articles transported on your orator's railway have been arranged in classes according to cost of carriage, price, risk of injury, bulk, volume of traffic, and other circumstances well understood, and have remained in substantially the same classes for many years, which has been recognized, approved and enacted into law by the statutory classification in effect in Missouri since 1895, and as required by its railroad commissions. The unequal, partial, arbitrary reduction in rates upon articles affected by said Act of 1905, as compared with other commodities and between the different commodities themselves included in said act, not only works an injustice between the shippers, purchasers, manufacturers of the State of Missouri, and deprives them of their property without due process of law, and deprives them of the equal protection of the laws, but likewise operates to deprive your orator of its property without due process of law and deprives it of the equal protection of the laws in that the legislature, having established maximum rates of charges for the transportation of all kinds of property, which are presumably fair and reasonable, now attempts to further regulate the affairs of your orator and to require it to discriminate in favor of certain persons and shippers and to give them a right of transportation for a less rate than the general rate heretofore fixed by law than is
19 just and reasonable in view of the cost to the carrier or the value of the service rendered to the shipper.

In consideration whereof, and forasmuch as your orator is remediless in the premises, and by the strict rules of the common law can only have relief in a court of equity where matters of this kind are properly cognizable and relievable, your orator prays: First, That the said act of the legislature of Missouri set forth in paragraph VII. of this bill, and for convenience called the Act of 1905 be declared unconstitutional, unenforcible and not binding upon your orator. Second. That the defendants, John A. Knott, Joseph P. Rice and Frank A. Wightman, railroad commissioners of the State of Missouri, their successors in office, agents and servants, be temporarily and permanently enjoined and restrained from taking any step to put in force the maximum rates mentioned in said Act of 1905, from requiring your orator to post same at any place or to file same with them; from receiving a schedule thereof to be filed with them; from taking or making out, or printing, or delivering any schedule of rates for your orator containing the maximum rates fixed by said act; from instituting or permitting any investigation of any complaint that any rate is unreasonable, extortionate or unjust because higher than the maximum rate fixed by said Act of 1905; from directing the attorney general of the state or any prosecuting or other attorney therein to prosecute or assist in prosecuting your orator, directly or indirectly, for any failure to file the schedule adopting the said maximum rates, or for any failure to recognize, adopt or comply with said Act of 1905. Third. That defendant, Herbert S. Hadley, the attorney general, be temporarily and permanently enjoined and restrained from

prosecuting or assisting in the prosecution of any suit or action against your orator to enforce against it in any action, directly or indirectly, any penalty in anywise dependent or based upon the failure of your orator to recognize and abide by the said Act of 1905.

Fourth, That the defendants, George Rodus, Frank E. Craig
20 and Robert Keith Furniture Company, and all other shippers affected by this proceeding, be temporarily and permanently enjoined and restrained from instituting any action under or taking any steps to collect any penalties or damages for the alleged violation of said Act of 1905. Fifth, That your orator have such other and further relief as may be just and equitable.

And may it please your Honors to grant unto your orator a writ of subpœna of the United States of America, issuing out of and under the seal of this Honorable Court, directed to the said John A. Knott, Joseph P. Rice and Frank A. Wightman, railroad commissioners of Missouri; Herbert S. Hadley, attorney general of the State of Missouri; and George Rodus, Frank E. Craig and Robert Keith Furniture Company, commanding them and each of them on a day certain therein to be named and under certain penalty, to be and appear before this Honorable Court, then and there — answer, but not under oath, such oath being expressly waived, all and singular the premises, and to stand to, perform and abide by such order, direction and decree as may be made against them in the premises; and that in the meantime and pending the hearing of this cause and the determination thereof a restraining order forthwith issue upon such terms as to the court shall seem just restraining said defendants as heretofore prayed.

And your orator will ever pray, etc.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
By J. H. HILAND, *Its Vice-President.*
FRANK HAGERMAN,
Solicitor for Complainant.

GEORGE R. PECK AND
BURTON HANSON,
Of Counsel.

21 STATE OF ILLINOIS,
County of Cook, ss:

I, J. H. Hiland, upon oath say, I am Vice President of The Chicago, Milwaukee & St. Paul Railway Company, complainant in above entitled bill, and as such officer have charge of the traffic operations of said company, and of the matters and things mentioned in said bills which I have read. I know the contents thereof, and the same are true of my own knowledge, except as to those matters therein stated upon information and belief, and as to those matters, I believe them to be true.

J. H. HILAND.

Subscribed and sworn to before me this 16th day of June, 1905.

W. D. MILLARD,
Notary Public.

My commission expires May 11, 1908.

22 Afterwards, towit, on the 17th day of June, A. D. 1905, a restraining order was filed and entered.

Said restraining order is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,

vs.

JOHN A. KNOTT, JOSEPH P. RICE, and FRANK A. WIGHTMAN, Railroad Commissioners of the State of Missouri; Herbert S. Hadley, Attorney General of the State of Missouri; George Rodus, Frank E. Craig, and Robert Keith Furniture Company, a Corporation, Defendants.

Restraining Order.

The original bill of complaint having been this June 17, 1905, by the solicitors for complainant duly presented, and the court being fully advised in the premises, orders and decrees: Complainant's application for temporary injunction herein is set down for hearing at the United States Circuit Court room in Kansas City, Missouri, on June 26, 1905, at 10 o'clock a. m., or as soon thereafter as it is convenient for the court to hear the same.

In the meantime, and until the further order of court herein, each and all of the above named defendant railroad commissioners, their agents, servants and successors, are restrained from taking any steps to put in force the maximum rates mentioned in the act of the legislature of the State of Missouri, approved April 15, 1905, and entitled "An Act, entitled 'An act to amend chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled "Corporations, private," by repealing section 1194 of said Revised Statutes, being part of article IV of said chapter concerning railroad classification—charges—commissioners, and to enact in lieu thereof the following new sections providing for the regulation of freight charges by railroads and the recovery of penalties for the violation thereof' "; from requiring complainant to post said maximum rates at any place, or to file same with them; from requiring a schedule thereof to be filed with them; from taking or making out, or printing or delivering any schedule of rates for complainant containing the maximum rates fixed by said act; from instituting any investigation of any complaint that any rate is unreasonable, extortionate or unjust because higher than the maximum rate fixed by said act; from directing the attorney general of the state, or any prosecuting attorney therein to prosecute or assist in prosecuting complainant directly or indirectly for any failure to file a

23 schedule adopting said maximum rates; or for any failure to recognize, adopt or comply with said act.

And in the meantime, and until the further order of court herein, the above named attorney general and his assistants and successors

are restrained from bringing any suit or action against complainant to enforce against it, directly or indirectly, any penalty in anywise dependent or based upon the failure of complainant to recognize or abide by the said act of the legislature.

And in the meantime and until the further order of court herein, the defendants John A. Knott, Joseph P. Rice, and Frank A. Wightman, Railroad Commissioners of the State of Missouri; Herbert S. Hadley, Attorney General of the State of Missouri; George Rodus, Frank E. Craig and Robert Keith Furniture Company, a corporation, and all other shippers affected by this proceeding, are restrained from instituting any action, or taking any steps to collect any penalties for the alleged violation of said act of 1905.

SMITH McPHERSON, *Judge*.

Received copy of foregoing restraining order this — day of June, 1905, and the undersigned defendants enter their appearances in said case as of the August, 1905, rules.

—— ——.
—— ——.

24 Afterwards, to-wit, on the 27th day of June, 1905, the following Order continuing Restraining Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2988.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, and Joseph P. Rice, John A. Knott, and Frank A. Wightman, Railroad Commissioners of the State of Missouri, et al., Defendants.

No. 2989.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2990.

THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2991.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2992.

THE ST. LOUIS, KANSAS CITY AND COLORADO RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2993.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

25 No. 3002.

KANSAS CITY, CLINTON & SPRINGFIELD RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 3003.

CHICAGO GREAT WESTERN RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 3006.

THE CHICAGO & ALTON RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

Order.

The application of complainants in above cases for temporary injunction coming on for hearing, this June 27th, 1905, complainants appearing by Frank Hagerman, their solicitor, and the Attorney General in person. At the request of the latter it is ordered that the said application be continued till July 8, 1905, and until further order of court the restraining orders heretofore issued shall continue in force.

(Signed) JNO. F. PHILIPS,
(Signed) SMITH McPHERSON,
Judges.

26 Thereupon, a certified copy of said restraining order was duly issued, served, returned and filed on the 8th day of July, 1905. At the end of said copy appears the following:

Received copy of foregoing restraining order this — day of June, 1905, and the undersigned defendants enter their appearances in said case as of the August, 1905, rules.

ROB'T KEITH FURNITURE & CARPET CO.
ROBERT KEITH, *Pr.*

Afterwards, a certified copy of said restraining order was duly issued, served, returned and filed on the 8th day of July, 1905. At the end of said copy appears the following:

Received copy of foregoing restraining order this — day of June, 1905, and the undersigned defendants enter their appearances in said case as of the August, 1905, rules.

F. E. CRAIG.

Afterwards, to-wit, a certified copy of said restraining order was duly issued, served, returned and filed on the 8th day of July, 1905. At the end of said copy appears the following:

Received copy of foregoing restraining order this — day of June, 1905, and the undersigned defendants enter their appearances in said case as of the August, 1905, rules.

GEO. RHODUS.

27 Afterwards, to-wit, on the 12th day of July, 1905, the following order continuing restraining order was filed and entered of record, to-wit:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO., Complainant,
vs.
HERBERT S. HADLEY, Attorney General; JOSEPH P. RICE, JOHN A. Knott and Frank A. Wightman, Railroad Commissioners, et al., Defendants.

Order.

This cause came on for hearing this 12th day of July, 1905, upon complainant's application for temporary injunction. The complainant, the attorney general and the defendant railroad commissioners appeared by counsel; the other defendants having been notified of the hearing; and the court being fully advised in the premises, orders and adjudges:

1. The restraining order heretofore issued herein shall continue and remain in force as a temporary injunction.

2. The complainant shall, on or before the 25th day of July, 1905, file herein an injunction bond in the sum of Ten Thousand dollars, to be approved by a judge or a clerk of this court, the defendants

consenting to accept the individual bond of the complainant, conditioned to pay, in case said injunction be dissolved, all damages ascertained herein to have been sustained by the defendants or any of them, or any person becoming a defendant herein.

(Signed) JNO. F. PHILIPS, *Judge.*

28 Afterwards, to-wit, on the 25th day of July, 1905, the Injunction Bond was approved and filed. Said Injunction Bond is in words and figures as follows, to-wit:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,

vs.

HERBERT S. HADLEY, Attorney General; JOSEPH P. RICE, JOHN A. Knott, and Frank A. Wightman, Railroad Commissioners, et al., Defendants.

Injunction Bond.

Know all men by these Presents, That the above complainant is held and firmly bound to above named defendants in the penal sum of Ten Thousand dollars ($10,000) well and truly to be paid in lawful money of the United States, for the payment of which it binds itself, its executors, administrators, successors and assigns.

This bond is made upon these conditions:

Whereas, the Court in above entitled cause made an order on July 12, 1905, granting a temporary injunction.

Now if said obligor pays, in case said injunction be dissolved, all damages ascertained herein to have been sustained by the defendants or any of them, or any person becoming a defendant herein then this obligation to be void; otherwise in force and effect.

Witness the hand and seal of said party this July 20th, 1905.

[SEAL.] CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,

By J. H. HILAND, *Third Vice President.*

Attest:

E. W. ADAMS, *Secretary.*

29 The foregoing bond is approved this 25 day of July, 1905, the appearing defendants waiving the necessity of any surety signing the bond.

ADELAIDE UTTER, *Clerk.*

30 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3004.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Complainant,

vs.

JOHN A. KNOTT, JOSEPH P. RICE and FRANK A. WIGHTMAN, Railroad Commissioners of the State of Missouri; Herbert S. Hadley, Attorney General of the State of Missouri; George Rhodus, Frank E. Craig, and Robert Keith Furniture Company, a Corporation, Defendants.

The Joint Demurrer of John A. Knott, Joseph P. Rice and Frank A. Wightman, Railroad Commissioners of the State of Missouri, Three of the Above-named Defendants, to the Bill of Complaint of the Chicago, Milwaukee and St. Paul Railway Company, the Above-named Complainant.

These Defendants, respectively, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained, to be true, in such manner and form as the same are therein and thereby set forth and alleged, demur to the said bill, and for causes of demurrer show:

1. That it appears by the complainant's own showing by the said bill, that it is not entitled to the relief prayed by said bill against these defendants, or either of them.

31 2. That said bill of complaint of the complainant is wholly without equity.

3. That it does not appear from said bill of complaint that charges for the transportation, between points within this State, of such articles of freight, maximum rates for the transportation of which are not fixed by said Act of 1905, might not or could not have been established by the complainant, if it had chosen to make any effort to do so, or by said Board of Railroad Commissioners, if it had been permitted by the complainant to do so, at such rates as would have been reasonable and just, both to the complainant and to the public, observance of which and of the provisions of the Act of 1905, in the transportation by complainant of its entire intra-state traffic, would, as a whole, have rendered to the complainant a fair and reasonable profit for the service of transporting the same. The complainant has made no effort or attempt to readjust its schedules of freight rates, as a whole, with a view of complying with the requirements of said Act of 1905, nor has it afforded to the said Board of Railroad Commissioners any opportunity, on its part, of making such effort, but, on the contrary, by filing the bill of complaint herein on the day said Act of 1905 took effect, and obtaining the restraining order herein, before said Board of Railroad Commissioners could, by any possibility, have taken any action in the direction of establishing freight rate schedules for intra-state traffic, which, considered as a whole, would produce a reasonable compensation to the complainant

for its service, has prevented said Board from making any such effort.

32 4. That said bill of complaint is deficient for want of certainty in its averments, in this, that it fails to show the amount of the complainant's operating and maintenance expenses in the operation of its lines of railroad in the State of Missouri, in transporting intra-state traffic, for any year prior to the passage and approval of said Act of 1905; and in this, that said bill of complaint fails to show to what extent or in what amount, if any, the total gross receipts of the complainant from local or intra-state traffic in Missouri, will be reduced.

Wherefore, and for divers other good causes of demurrer appearing on said bill, these defendants demur thereto, and they pray the judgment, of this Honorable Court whether they shall be compelled to make further, or any answer, to the said bill; and they humbly pray to be hence dismissed with their reasonable costs in their behalf sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
SANFORD B. LADD,
Solicitors for Defendants.

SANFORD B. LADD,
Of Counsel.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

SANFORD B. LADD,
Of Counsel for Defendants.

33 Afterwards, to-wit, on the 7th day of August, 1905, the Demurrer of Herbert S. Hadley, Attorney General, was filed. Said Demurrer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3004.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
Complainant,
vs.
JOHN A. KNOTT, JOSEPH P. RICE and FRANK A. WIGHTMAN, Railroad Commissioners of the State of Missouri; Herbert S. Hadley, Attorney General of the State of Missouri; George Rhodus, Frank E. Craig, and Robert Keith Furniture Company, a Corporation, Defendants.

The Demurrer of Herbert S. Hadley, Attorney General of the State of Missouri, One of the Above Named Defendants, to the Bill of Complaint of the Chicago, Milwaukee and St. Paul Railway Company, the Above-named Complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint con-

tained, to be true, in such manner and form as the same are therein and thereby set forth and alleged, demurs to the said bill, and for causes of demurrer shows:

1. That it appears by the complainant's own showing by the said bill, that it is not entitled to the relief prayed by said bill, or any relief whatever, against this defendant.

2. That said Bill of Complaint of the complainant is wholly without equity.

3. That it does not appear from said bill of complaint
34 that charges for the transportation, between points within this State, of such articles of freight, maximum rates for the transportation of which are not fixed by said Act of 1905, might not or could not have been established by the complainant, if it had chosen to make any effort to do so, or by said Board of Railroad Commissioners, if it had been permitted by the complainant to do so, at such rates as would have been reasonable and just, both to the complainant and to the public, observance of which and of the provisions of the Act of 1905, in the transportation by complainant of its entire intra-state traffic, would, as a whole, have rendered to the complainant a fair and reasonable profit for the service of transporting the same. The complainant has made no effort or attempt to readjust its schedules of freight rates, as a whole, with a view of complying with the requirements of said Act of 1905, nor has it afforded to the said Board of Railroad Commissioners any opportunity on its part, of making such effort, but, on the contrary, by filing the bill of complaint herein on the day said act of 1905 took effect, and obtaining the restraining order herein, before said Board of Railroad Commissioners could, by any possibility, have taken any action in the direction of establishing freight rate schedules for intra-state traffic, which, considered as a whole, would produce a reasonable compensation to the complainant for its service, has prevented said Board from making any such effort.

4. That said bill of complaint is deficient for want of certainty in its averments, in this, that it fails to show the amount of the complainant's operating and maintenance expenses in the operation of its lines of railroad in the State of Missouri, in transporting intra-state traffic, for any year prior to the passage and approval of said Act of 1905; and in this, that said bill of complaint fails to show to what extent or in what amount, if any, the total gross receipts of the complainant from local or intra-state traffic in Missouri, will be reduced.

35 5. That this defendant is not a proper party defendant to the bill of complaint.

Wherefore, and for divers other good causes of demurrer appearing on said bill, this defendant demurrs thereto, and he prays the judgment of this honorable Court whether he shall be compelled to make further or any answer to the said bill; and he humbly prays to be hence dismissed with his reasonable costs in his behalf sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH.
SANFORD B. LADD.

SANFORD B. LADD,
Of Counsel.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

SANFORD B. LADD,
Of Counsel for Defendants.

36 Afterwards, to-wit, on the 14th day of October, 1905, a waiver of affidavits to demurrers was filed. Said waiver of affidavits is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. —.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
Complainant,
vs.
JOHN A. KNOTT et al., Defendants.

The affidavits of the defendants to the several demurrers this day filed herein to the Bill of Complaint, are hereby waived.

Kansas City, Mo., August 7, 1905.

FRANK HAGERMAN,
Solicitors for Complainant.

37 Afterwards, to-wit, on the 14th day of October, 1905, the following order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Complainant,
vs.
JOHN A. KNOTT et al., Defendants.

Order.

This cause coming on for hearing this October 14, 1905, upon each and all of the demurrers heretofore filed by defendants herein, the complainant appeared by Frank Hagerman, its solicitor, and said demurring defendants by Sanford B. Ladd, their solicitor, and the court being fully advised in the premises overrules each and all of the said demurrers, and at the request of the said solicitor of said defendants they are given until the November, 1905, Rules in which to file answers.

(Signed) SMITH McPHERSON, *Judge.*

38 Afterwards, towit, on the 28th day of November A. D. 1905, the joint and several answer of John A. Knott et al. was filed.

Said answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,

vs.

JOHN A. KNOTT, JOSEPH P. RICE, and FRANK A. WIGHTMAN, Railroad Commissioners of the State of Missouri; Herbert S. Hadley, Attorney General of the State of Missouri; George Rodus, Frank E. Craig, and Robert Keith Furniture Company, a Corporation, Defendants.

The Joint and Several Answer of John A. Knott, Joseph P. Rice, and Frank A. Wightman, Three of the Defendants, to the Bill of Complaint of the Chicago, Milwaukee and St. Paul Railway Company, Complainant.

These defendants respectively now and at all times hereafter saving to themselves all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering, say:

I.

They admit the averments of paragraph numbered I of the complainant's bill of complaint, except in the following particular: They say that they have no knowledge, information or belief as to
39 whether the mileage of the railroads owned and operated by it in Missouri, amounts, in the aggregate to one hundred and forty and 27/100 (140 27/100) miles, more or less.

II.

These defendants admit that this cause arises under the Constitution and Laws of the United States; but they deny that said Act of 1905 is unconstitutional or violative of the provisions of the Constitution of the United States or of the Fourteenth amendment thereto, or contrary to the laws of the United States. They admit that the matter and amount in dispute exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars ($2,000).

III.

They admit that they constitute the Board of Railroad Commissioners of the State of Missouri, and that the defendant, Herbert S. Hadley, is the Attorney General of the State of Missouri, but they deny that either they or the said defendant, Hadley, are required by law to do or perform the special duties mentioned in said bill of complaint, except as in this answer hereinafter admitted.

IV.

They admit that the other defendants are citizens and residents, respectively, of the State of Missouri, and of the counties of said State mentioned in paragraph IV of said bill of complaint; but whether each or any of them are engaged in shipping over the complainant's road or other roads in the State of Missouri, any of the commodities mentioned in the Act of 1905, or whether they
40 represent any class of shippers, these defendants have no knowledge, information or belief.

V.

They admit that paragraph V of complainant's bill of complaint, correctly sets out Sections 1191, 1192 and 1193 of the Revised Statutes of Missouri, of 1899, and that Section 1194 of said Revised Statutes fixed the maximum rates for the classes of freight designated in said Section 1193, as Classes D, E, F, G, H, I and J, respectively. They admit that the statutes of the state provide for the election and qualification of Railroad Commissioners, and prescribe their special duties, and as to the allegations in paragraph V of said bill of complaint, regarding the special duties imposed upon them and upon prosecuting attorneys and the Attorney General by the statutes of the State, they aver that Articles II and IV of Chapter 12 of the Revised Statutes of Missouri of 1899, and an Act of the General Assembly of the State of Missouri, entitled, "An Act to amend Chapter 12 of the Revised Statutes of the State of Missouri of 1899, entitled 'Corporations, private,' by adding two new sections after Section 1194, to be known as Sections 1194*a* and 1194*b*, providing that the board of railroad and warehouse commissioners shall fix, maintain, establish, reduce and modify freight rates upon all railroads in this State, and providing for the manner of so doing and enforcing the same," approved April 6, 1903, published in the "Laws of Missouri, passed at the Session of the Forty-second General Assembly," at page 132, of which said Statutes and Act, this Court will take judicial notice, prescribe particularly all the duties imposed by law upon these defendants, constituting the Board of Railroad Commissioners, and upon prosecuting attorneys and the Attorney General, respecting freight rates and the enforcement
41 of any laws of this State governing or affecting the same; and they beg leave to refer to said statutes and said Act, and that the same may be considered in connection with this answer with like effect as if they had been fully set out herein.

VI.

These defendants admit the passage by the legislature of the State of Missouri, of the Act approved April 6, 1903, and that said Act is correctly set out in paragraph VI of said bill of complaint.

VII.

These defendants admit the passage by the legislature of the State of Missouri, of the Act approved April 15, 1905, and that said Act is correctly set out in paragraph VII of said bill of complaint. They admit that said last named Act took effect on the 16th day of June, 1905; that the rates at the time of the filing of said bill of complaint, being charged by the complainant for the transportation of freight of the character mentioned in said last named Act, were shown in schedules on file with the Railroad Commissioners; but these defendants deny that said rates so charged by complainant were, as respects all the freight of the character mentioned in said Act, in excess of the maximum rates fixed by said Act of 1905. They admit that as to some of the commodities mentioned in said Act, the same would require some reduction in the rates charged by the complainant for the transportation thereof at the time of the filing of said bill of complaint, and that such reduction would make necessary a change in the schedules so filed by the complainant with the Railroad Commissioners; but these defendants deny that such change could not and cannot be made by the complainant without jeopardizing
42 its property interests. These defendants deny that they had at or before the filing of said bill of complaint, threatened to enforce the provisions of said Act of 1905 by entering upon investigations, either upon the instigation of the Board of Railroad Commissioners or on the complaint of shippers or by determining or adjudging the complainant's then existing schedule of rates to be unreasonable, unjust or extortionate, or by requiring the complainant, under pain of any penalties, to file or publish a new schedule fixing rates not in excess of those mentioned in said Act of 1905, and they deny that they proposed to do any of said things. They deny that they proposed to file, post or publish as the complainant's schedule the maximum rates fixed in said Act of 1905, if the complainant should refuse to do so, or to direct any prosecuting attorney to prosecute or recover of complainant any penalties, or to direct the Attorney General to assist in any such prosecution, or recover any penalties for the complainant's failure to comply with the orders which they proposed from time to time to make in investigations instituted for the enforcement of said Act of 1905. They deny that at that time they proposed to make any such investigations. On the contrary, these defendants aver that when this suit was begun the time had not arrived at which these defendants could take any action whatever under or in pursuance of said Act of 1905, and that they were not at that time proposing, because the time had not then arrived, when they, as such Board of Railroad Commissioners, could properly or lawfully propose any action in the premises. They had not, as a Board, determined or considered the course proper to be pursued by

them in respect of the matter when said Act of 1905 should have taken effect. They deny that any prosecuting attorney or the Attorney General would have conducted such prosecutions or sought to recover any such penalties.

As to whether shippers along the line of the complainant's railroad were then or are now numerous, or engaged daily or at all in making or receiving shipments to or from points in the State of Missouri of any freight of the special classes designated in said Act of 1905, these defendants have no knowledge, information or belief. They deny that by any such shippers or shipper there would have been or will be instituted suits to recover of the complainant any damages or attorneys' fees for charging rates higher than those fixed by said Act of 1905.

Whether any other shippers in the counties in the State where the complainant's line of road extends are interested with those named as defendants herein, these defendants have no knowledge, information or belief; but they deny that any shipper or other person not named as a defendant in this action can or will be bound by any decree which may be entered herein.

VIII.

These defendants deny that said Act of 1905 is invalid or inoperative or of no force or effect for any of the reasons mentioned in paragraph VIII of the complainant's said bill of complaint. They deny that said Act fixes rates confiscatory in their nature or unreasonable in amount, or insufficient to permit the complainant to operate its property in Missouri, without loss, or makes it impossible for freight to be carried by the complainant between points in Missouri, at any profit. They deny that all or any part of said Act is contrary to or violative of the provisions of the Constitution of the United States, or of the Fourteenth Amendment thereto. They deny that said Act is invalid, as alleged in paragraph XII or paragraph XIII of said bill of complaint, or that it is violative of said Fourteenth Amendement to the Constitution of the United States. They deny that the provision of said Act, that in computing the rate of freight, the distance shall be computed from the point where it is received to the point of destination in the state, notwithstanding it may pass from one road to another, impairs the complainant's freedom of contract or fixes a rate for it based upon carriage over the line of another road, or that thereby any provision of the federal constitution or of any amendment thereto is violated, or that the freedom of contract guaranteed by Section 4 of Article 2 of the State Constitution is denied. They deny that said Section 1194*a* is a discrimination between individuals and companies, or denies to the complainant the equal protection of the law guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

These defendants further aver that even if said Section 1194*a* did operate to discriminate against the complainant, it might be stricken out and Section 1194*c* would remain a valid and complete enactment, capable of enforcement. They aver that the effect of said

Section 1194*a* is not to discriminate against the complainant, and that at the time of the taking effect of said Act of 1905, there was not and is not now any railroad or part of railroad in the State of Missouri, which is not owned and operated by a railroad company. They deny that said law as it now stands is uncertain, as averred in subdivision (*e*) of paragraph VIII of the complainant's bill of complaint, for the reason stated therein, or for any other reason, or that said Act of 1905 is invalid because of any reason stated in said subdivision (*e*).

45 IX.

These defendants have no knowledge, information or belief as to the number of miles of railroad which the complainant has in its entire system, or whether the whole of it, or that portion of it in Missouri was constructed and fairly acquired at a fair and reasonable cost, or whether it was judiciously located, or whether it has at all times or ever was properly or economically operated, or whether its capitalization in bonds and stocks for its entire system, is the amount stated in the bill of complaint, or whether such capitalization is fair or reasonable or less than the amount for which said road could be reproduced, or whether its fixed charges are no more than would be required to produce or acquire the property, its equipment, facilities and terminals.

Whether the complainant's lines in Missouri secure and receive a due, fair and reasonable proportionate benefit of the entire system, or the value of the property in Missouri, or its capacity for serving the public, is proportionately increased or augmented thereby, or whether the cost of constructing or replacing its railroad in Missouri, and providing and furnishing its equipment and terminals, or of constructing and replacing its entire system to-day would exceed its original cost, these defendants have no knowledge, information or belief.

These defendants deny that upon the value of the property of the complainant it has only been able in the past to have any kind of returns, because it was operated as a part of a whole system; they deny that the rates fixed in the Act of 1905, or any of them, are unjust, unfair or unreasonable.

46 X.

These defendants admit that the rates at the time of the filing of the said bill of complaint, and now charged by complainant for State shipments on some of the classes of freight mentioned in said Act of 1905, were and are in some cases, in excess of the maximums therein fixed, but they are informed and believe that, as to some of the commodities mentioned in said Act, the rates charged by the complainant were and are less than the maximum rates fixed in said Act. They deny that if the charges for the classes of freight mentioned in said Act of 1905 should be made by the complainant at the maximum rates fixed in said Act, the complainant would fail to derive any profit therefrom or would be compelled to do such business at any loss. They deny that the rates fixed in said Act are un-

just or unreasonably low or confiscatory in their nature, or that they will not make a return upon the investment in the property of complainant in this State, or that the gross receipts of all the State business which complainant does, can or will do in Missouri, when charging the maximum rates fixed by the Act of 1905, for the classes of freight therein mentioned, will not be sufficient to pay the operating expenses and the cost of doing such business in the State, or that there will not be left any sum as profit or return upon the value of the property of the complainant devoted to the use of such business in this State.

They deny that the maximum rates for any class of freight mentioned in said Act of 1905, are not sufficient to pay the cost of the carriage thereof.

XI.

These defendants have no knowledge, information or belief as to the amount of the total earnings of the complainant from local and State business in Missouri for the last three years or any one of them, or whether they were or were not in excess of the amounts stated in paragraph XI of complainant's bill of complaint.

47 They deny that the expenses of doing such local and State business for said three years, or any one of them, were so great that the net receipts do not represent a fair return upon the investment of complainant in this State.

These defendants have no knowledge, information or belief as to whether any reduction in rates under said Act of 1905, will not increase the local traffic, or whether the volume of State and local business will not be more in 1905 than it was in 1904, or whether the expenses of doing such business will be as great, or whether if such business should increase there would be a proportional increase in such expense.

These defendants deny that if the complainant, for the class of freight mentioned in the Act of 1905, should charge the maximum rates therein fixed, its total gross receipts from local or State traffic in Missouri would be less. Whether the expenses of doing such business in such case, would or would not be lessened, these defendants have no knowledge, information or belief.

They deny that any reduction in rates attempted by said Act of 1905 is unfair or unjust, or that it fails to give a fair return on the investment in complainant's property, or that the enforcement of said Act will compel the complainant to do its local and State business in such a way as not to permit it to make a fair or reasonable profit thereon.

XII.

These defendants admit that the companies mentioned in paragraph XII of the complainant's bill of complaint, carry the classes of freight mentioned in said Act, and that they claim that the maximum rates thereby fixed are confiscatory in their nature, and if charged, would result in their doing their State business without any profit. But these defendants deny that such claim is, in point of fact, true.

48 These defendants deny that the rates fixed by the said Act of 1905 are unreasonably low as against any of said companies or that they will not permit any of them to make a profit upon their State business, or that for that reason said Act is invalid as against any of said companies.

They deny that said Act, if held valid as to complainant, is unconstitutional because of any alleged discrimination between the complainant and any other persons or corporations operating railroads in this State. They aver that the only discrimination of which the complainant will be allowed to complain, is a discrimination against itself in favor of some other person or corporation; and they deny that any of the provisions of the Constitution of the United States or of any of the amendments thereto, are, in any respect, violated by said Act.

XIII.

Further answering and with special reference to the averments of paragraph XIII of complainant's bill of complaint, these defendants deny that said Act of 1905 fixes and establishes maximum rates which are unjust, or unreasonable, or unconstitutional, for any reason.

These defendants have no knowledge, information or belief as to whether the cost of transporting live stock is greater than that of any of the other commodities mentioned in said Act, or whether the same reduces the rate on said live stock on an average of fifty per cent, or whether the reduction in rates on salt is about thirty-three per cent, and on cement is only about fourteen per cent. They have no knowledge, information or belief as to whether the different articles transported on complainant's railway have been arranged in classes according to cost of carriage, price, risk of injury, bulk, volume of traffic, or any other circumstances, or have remained
49 in substantially the same classes for any period of time, or whether the same has been recognized, approved or enacted into law by any statutory classification in effect in Missouri.

They deny that any reduction in rates upon articles affected by said Act of 1905 is unequal or partial or arbitrary as compared with any other commodities, or as between the commodities included in said Act. Or that the same works any injustice between shippers, purchasers or manufacturers of the State of Missouri, or deprives them of their property without due process of law or deprives them of the equal protection of the laws, or operates to deprive the complainant of its property without due process of law or deprives the complainant of the equal protection of the laws, by any of the methods or for any of the reasons mentioned in said paragraph XIII of the bill of complaint. They deny that the legislature had or established maximum rates of charges for the transportation of all kinds of property, or that even if the legislature had done so, any change effected in such rates by said Act of 1905, is presumably unfair or unreasonable in any respect. They deny that the legislature requires the complainant to discriminate in favor of any persons or

shippers or to give them a right of transportation for a less rate than the general rate heretofore fixed by the law; or that such rate is less than is just and reasonable in view of the cost to the carrier and the value of the service rendered to the shipper.

XIV.

These defendants, further answering, say that they are informed and believe that this complainant and seventeen other railroad companies or corporations, owning and operating lines of railroad in the State of Missouri, immediately after the approval of said Act of 1905, agreed and came to an understanding with each other, that none of them would comply with the provisions thereof, or transport
50 the commodities named in said Act at the rates mentioned therein, or make any effort to revise their schedules of rates for transporting the commodities mentioned in said Act and other commodities transported by them, in such a manner as to yield obedience to said Act and at the same time derive a reasonable profit upon the fair valuation of their property necessary to carry on their intra-State business, but determined, on concerted action among themselves, to disobey said Act, to deny its validity and any obligation on their part to comply with it, and to bring suits, each of them for itself, on the day said Act should take effect, to enjoin the officers of the State from taking any action or discharging any duties which might be imposed upon them by law in respect of said Act, and for the further purpose of obtaining a decree of this court adjudging said Act to be null and void upon the grounds stated in this complainant's bill of complaint.

These defendants further aver that in pursuance of said agreement and understanding, this complainant and the said seventeen other companies or corporations did, on the 16th day of June, 1905, each for itself, file in this court its bill of complaint, all of them being upon substantially the same grounds as those stated in this complainant's bill of complaint, and praying for substantially the same relief, and did, on the same day, in each of said suits obtain from this court a restraining order, directed to and which was served upon these defendants and the Attorney General of the State of Missouri, and certain persons designated in said bills of complaint as shippers, enjoining these defendants and the Attorney General from performing any of the duties imposed upon them as State officials, by law, looking to the enforcement of the provisions of said Act, (for the express terms of which said order these defendants pray leave to refer to the same as it appears in the record of this cause), and afterwards, while said restraining order was in force, did obtain from this court a
51 preliminary injunction in the terms of said order, which said preliminary injunction is still operative.

These defendants say that they are informed and believe that the rates fixed by said Act of 1905, do not affect all the articles of freight transported by the complainant in its intra-State traffic, but that a very large number of articles, and a very large part of its intra-State

traffic remain wholly unaffected and unregulated as to rates, by said Act or by any other existing statute. And these defendants say that the question of whether rates are compensatory or otherwise, can only be determined upon a consideration of a schedule of rates which shall embrace every article and all the freight transported by the complainant in carrying on its intra-State business.

These defendants are informed and believe that the complainant, if it had chosen to do so, instead of attacking the reasonableness or fairness of the rates upon the few articles mentioned in the Act of 1905, might have revised its schedule or tariff of rates upon all the articles of freight transported by it in carrying on its intra-State traffic, including those mentioned in said Act of 1905, in such a manner that the rates for carrying the articles not mentioned in said Act, would have been not unreasonable or unjust, either to itself or to the public, and that the income derived by the complainant for performing the service of transporting freight at the rates and charges fixed in such a schedule, would have been sufficient to assure to the complainant a fair and reasonable return upon the fair value of its property necessarily employed in the carrying on of such intra-State business.

52 These defendants further aver that the complainant afforded to these defendants, as a Board of Railroad Commissioners, no opportunity, after said Act of 1905 took effect, to revise, adjust and fix a schedule of rates upon all the articles of freight transported by the complainant in its intra-State traffic, including those mentioned in said Act of 1905, in such a manner that the provisions of said Act of 1905 would be observed, and at the same time the rates upon all other articles not mentioned in said Act, should be not unreasonable or unjust, either to the complainant or to the public.

These defendants further say that if the complainant had failed to so revise or to attempt to so revise its schedules, these defendants, as such Board, would, if they had been given the opportunity, which was denied to them by the injunction in this cause, in the discharge of the duties imposed on them by law, have attempted to fix and establish such a schedule of rates upon all the articles of freight transported by the complainant in its intra-State traffic, as would have observed or complied with the provisions of said Act of 1905, and in other respects have been not unjust or unfair either to the complainant or to the public, and they believe that they could have done so.

These defendants further say that by the issue of the restraining order and the preliminary injunction in this cause, they have been prevented from fixing any such schedule or attempting to fix a schedule of rates which should be just to the complainant and to the shippers; that the complainant, by the filing of its bill before these defendants, to such Board, could lawfully act in the premises, has unwarrantably assumed that these defendants, as such Board, would fix and establish a schedule of rates which would be unjust to the complainant.

53 These defendants say that in view of the statutes of this State, which define the duties to be discharged by them, as

such Board, this action ought not to be maintained, because it was brought before these defendants had any opportunity to discharge any of such duties or act in the matter of a general revision of the schedule of rates, made necessary by said Act of 1905.

These defendants deny that the complainant is entitled to any relief whatever against these defendants, without this, that any other matter, cause or thing in the complainant's said bill of complaint, or amendments thereto, contained, material or necessary for these defendants to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of these defendants; all which matters and things these defendants are ready and willing to aver, maintain and prove, as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
Assistant Attorney General,
Solicitors for Defendants.

SANFORD B. LADD,
Of Counsel.

54 Afterwards, to-wit, on the 1st day of December A. D. 1905, the answer of Herbert S. Hadley, Attorney General, was filed.

Said answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3004.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Complainant,

vs.

JOHN A. KNOTT, JOSEPH P. RICE, and FRANK A. WIGHTMAN, Railroad Commissioners of the State of Missouri; Herbert S. Hadley, Attorney General of the State of Missouri; George Rodus, Frank E. Craig, and Robert Keith Furniture Company, a Corporation, Defendants.

The Answer of Herbert S. Hadley, Attorney General of the State of Missouri, One of the Defendants, to the Bill of Complaint of the Chicago, Milwaukee and St. Paul Railway Company, Complainant.

This defendant now and at all times hereafter saving to himself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for him to make answer to, answering, says:

I.

He admits the averments of paragraph numbered I of the complainant's bill of complaint, except in the following particular: He says that he has no knowledge, information or belief as to whether the mileage of the railroads owned and operated by it in Missouri, amounts in the aggregate to one hundred and forty and 27/100 (140 27/100) miles, more or less.

55

II.

This defendant admits that this cause arises under the Constitution and laws of the United States; but he denies that said Act of 1905 is unconstitutional or violative of the provisions of the Constitution of the United States or of the Fourteenth Amendment thereto, or contrary to the laws of the United States. He admits that the matter and amount in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars ($2,000).

III.

He admits that the defendants, John A. Knott, Joseph P. Rice and Frank A. Wightman, constitute the Board of Railroad Commissioners of the State of Missouri, and that this defendant is the Attorney General of the State of Missouri, but he denies that either they or this defendant, are required by law to do or perform the special duties mentioned in said bill of complaint, except as in this answer hereinafter admitted.

IV.

He admits that the other defendants are citizens and residents respectively, of the State of Missouri, and of the counties of said state mentioned in paragraph IV of said bill of complaint; but whether each or any of them are engaged in shipping over the complainant's road or other roads in the State of Missouri any of the commodities mentioned in the Act of 1905, or whether they represent any class of shippers, this defendant has no knowledge, information or belief.

V.

He admits that paragraph V of complainant's bill of complaint, correctly sets out sections 1191, 1192, and 1193 of the Revised Statutes of Missouri of 1899, and that section 1194 of said Revised Statutes fixed the maximum rates for the classes of freight designated in said section 1193, as classes D, E, F, G, H, I and J respectively.

He admits that the statutes of the state provide for the elec-
56 tion and qualification of railroad commissioners, and prescribe their special duties, and as to the allegations in paragraph V of said bill of complaint, regarding the special duties imposed upon them, and upon prosecuting attorneys and the Attorney General by the statutes of the state, he avers that Articles II and IV of Chapter 12 of the Revised Statutes of Missouri of 1899, and of an act of the General Assembly of the State of Missouri, en-

titled "An act to amend Chapter 12 of the Revised Statutes of the State of Missouri, of 1899, entitled 'Corporations, private,' by adding two new sections after Section 1194, to be known as Sections 1194*a* and 1194*b*, providing that the board of railroad and warehouse commissioners shall fix, maintain, establish, reduce and modify freight rates upon all railroads in this State, and providing for the manner of so doing and enforcing the same," approved April 6, 1903, published in the "Laws of Missouri, passed at the Session of the Forty-second General Assembly" at page 132, of which said statutes and Act, this Court will take judicial notice, prescribe particularly all the duties imposed by law upon these defendants, constituting the board of railroad commissioners, and upon prosecuting attorneys and the Attorney General, respecting freight rates and the enforcement of any laws of this state governing or affecting the same; and he prays leave to refer to said statutes and said Act, and that the same may be considered in connection with this answer with like effect as if they had been fully set out herein.

57

VI.

This defendant admits the passage by the Legislature of the State of Missouri, of the Act approved April 6, 1903, and that said Act is correctly set out in paragraph VI of said bill of complaint.

VII.

This defendant admits the passage by the Legislature of the State of Missouri, of the Act approved April 15, 1905, and that said Act is correctly set out in paragraph VII of said bill of complaint. He admits that said last named Act took effect on the 16th day of June, 1905; that the rates at the time of the filing of said bill of complaint being charged by the complainant for the transportation of freight of the character mentioned in said last named Act, were shown in the schedules on file with the Railroad Commissioners; but this defendant denies that said rates so charged by complainant were, as respects all the freight of the character mentioned in said Act, in excess of the maximum rates fixed by said Act of 1905. He admits that as to some of the commodities mentioned in said Act, the same would require some reduction in the rates charged by the complainant for the transportation thereof at the time of the filing of said bill of complaint, and that such reductions would make necessary a change in the schedules so filed by the complainant with the Railroad Commissioners; but this defendant denies that such change could not and cannot be made by the complainant without jeopardizing its property interests. This defendant denies that the railroad commissioners had at or before the filing of said bill of complaint, threatened to enforce the provisions of said Act of 1905 by entering upon investigations, either upon the instigation of the board of railroad commissioners or on the complaint of shippers or by determining or adjudging complainant's then existing schedule of rates to be unreasonable, unjust or extortionate, or by re-

quiring the complainant, under pain of penalties, to file or publish a new schedule fixing rates not in excess of those mentioned in said Act of 1905; and he denies that they proposed to do any of said things. He denies that they proposed to file, post or publish
58 as the complainant's schedule, the maximum rates fixed in said Act of 1905, if the complainant should refuse to do so, or to direct any prosecuting attorney to prosecute or recover of complainant any penalties, or to direct the Attorney General to assist in any such prosecution, or recover any penalties for the complainant's failure to comply with the orders which they proposed from time to time to make in investigations instituted for the enforcement of said Act of 1905. He denies that at that time they proposed to make any such investigations. On the contrary, this defendant avers that when this suit was begun the time had not arrived at which the Railroad Commissioners could take any action whatever under or in pursuance of said Act of 1905, and that they were not at that time proposing, because the time had not then arrived when they, as such Board of Railroad Commissioners, could properly or lawfully propose any action in the premises. They had not, as a board, determined or considered the course proper to be pursued by them in respect of the matter when said Act of 1905 should have taken effect. He denies that any prosecuting attorney or the Attorney General would have conducted such prosecutions or sought to recover any such penalties.

As to whether shippers along the line of the complainant's railroad were then or are now numerous, or engaged daily, or at all, in making or receiving shipments to or from points in the State of Missouri of any freight of the special classes designated in said Act of 1905, this defendant has no knowledge, information or belief. He denies that by any such shippers or shipper there would have been, or will be, instituted suits to recover of the complainant
59 any damages or attorney's fees for charging rates higher than those fixed by said Act of 1905.

Whether any other shippers in the counties in the state where the complainant's line of road extends, are interested with those named as defendants herein, this defendant has no knowledge, information or belief; but he denies that any shipper or other person not named as a defendant in this action can or will be bound by any decree which may be entered herein.

VIII.

This defendant denies that said Act of 1905 is invalid or inoperative or of no force or effect for any of the reasons mentioned in paragraph VIII of the complainant's said bill of complaint. He denies that said Act fixes rates confiscatory in their nature, or unreasonable in amount, or insufficient to permit the complainant to operate its property in Missouri, without loss, or makes it impossible for freight to be carried by the complainant between points in Missouri, at any profit. He denies that all or any part of said Act is contrary to or violative of the provisions of the constitution of the United States, or of the Fourteenth Amendment thereto. He de-

nies that said act in invalid, as alleged in paragraph XII or paragraph XIII of said bill of complaint, or that it is violative of said Fourteenth Amendment to the constitution of the United States. He denies that the provision of said act, that in computing the rate of freight, the distance shall be computed from the point where it is received to the point of destination in the state, notwithstanding it may pass from one road to another, impairs the complainant's freedom of contract, or fixes a rate for it, based upon carriage over the line of another road, or that thereby any provision of the
60 federal constitution or of any amendment thereto is violated, or that the freedom of contract guaranteed by section 4 of article 2 of the state constitution, is denied. He denies that said section 1194*a* is a discrimination between individuals and companies, or denies to the complainant the equal protection of the law, guaranteed to it by the Fourteenth Amendment to the constitution of the United States.

This defendant further avers that even if said section 1194*a* did operate to discriminate against the complainant, it might be stricken out and section 1194*a* would remain a valid and complete enactment, capable of enforcement. He avers that the effect of said section 1194*a* is not to discriminate against the complainant, and that at the time of the taking effect of said act, of 1905, there was not and is not now any railroad or part of railroad in the state of Missouri, which is not owned and operated by a railroad company. He denies that said law as it now stands is uncertain, as averred in subdivision (*e*) of paragraph VIII of complainant's bill of complaint, for the reason stated therein, or for any other reason, or that said act of 1905, is invalid because of any reason stated in said subdivision (*e*).

This defendant has no knowledge, information or belief as to the number of miles of railroad which the complainant has in its entire system, or whether the whole of it, or that portion of it in Missouri was constructed and fairly acquired at a fair and reasonable cost, or whether it was judiciously located, or whether it has at all times or ever been properly or economically operated, or whether its capitalization in bonds and stocks for its entire system, is the amount stated in the bill of complaint or whether such capitalization is fair or reasonable or less than the amount for which said road could be reproduced, or whether its fixed charges are no more than
61 would be required to produce or acquire the property, its equipment, facilities and terminals.

Whether the complainant's lines in Missouri secure and receive a due, fair and reasonable proportionate benefit of the entire system, or the value of the property in Missouri, or its capacity for serving the public, is proportionately increased or augmented thereby, or whether the cost of constructing or replacing its railroad in Missouri, and providing and furnishing its equipment and terminals, or of constructing and replacing its entire system to-day would exceed its original cost, this defendant has no knowledge, information or belief.

This defendant denies that upon the value of the property of the complainant it has only been able in the past to have any kind of

returns, because it was operated as a part of a whole system; he denies that the rates fixed in the act of 1905, or any of them, are unjust, unfair or unreasonable.

X.

This defendant admits that the rates at the time of the filing of the said bill of complaint, and now charged by complainant for state shipments on some of the classes of freight mentioned in said act of 1905, were and are in some cases, in excess of the maximums therein fixed, but he is informed and believes that, as to some of the commodities mentioned in said act, the rates charged by the complainant were and are less than the maximum rates fixed in said act. He denies that if the charges for the classes of freight mentioned in said act of 1905 should be made by the complainant at the maximum rates fixed in said act, the complainant would fail to derive any profit therefrom or would be compelled to do such business at any loss. He denies that the rates fixed in said act are unjust or unreasonably low or confiscatory in their nature, or that they will not make a return upon the investment in the property of complainant in this state, or that the gross receipts of all the state business which
62 complainant does, can or will do in Missouri, when charging the maximum rates fixed by the act of 1905, for the classes of freight therein mentioned, will not be sufficient to pay the operating expenses and the cost of doing such business in the state, or that there will not be left any sum as profit or return upon the value of the property of the complainant devoted to the use of such business in this state.

He denies that the maximum rates for any class of freight mentioned in said Act of 1905, are not sufficient to pay the cost of the carriage thereof.

XI.

This defendant has no knowledge, information or belief as to the amount of the total earnings of the complainant from local and state business in Missouri for the last three years or any one of them or whether they were or were not in excess of the amounts stated in paragraph XI of complainant's bill of complaint.

He denies that the expense of doing such local and state business for said three years, or any one of them, *were* so great that the net receipts do not represent a fair return upon the investment of complainant in this state.

This defendant has no knowledge, information or belief as to whether any reduction in rates under said act of 1905, will not increase the local traffic, or whether the volume of state and local business will not be more in 1905 than it was in 1904, or whether the expense of doing such business will be as great, or whether if such business should increase there would be a proportional increase in such expense.

This defendant denies that if the complainant, for the class of freight mentioned in the act of 1905, should charge the maximum

rates therein fixed, its total gross receipts from local or state
63 traffic in Missouri would be less. Whether the expense of doing such business in such case, would or would not be lessened this defendant has no knowledge, information or belief.

He denies that any reduction in rates attempted by said act of 1905 is unfair or unjust, or that it fails to give a fair return on the investment in complainant's property, or that the enforcement of said act will compel the complainant to do its local and state business in such a way as not to permit it to make a fair or reasonable profit thereon.

XII.

This defendant admits that the companies mentioned in paragraph XII of the complainant's bill of complaint carry the classes of freight mentioned in said Act, and that they claim that the maximum rates thereby fixed are confiscatory in their nature, and if charged would result in their doing their State business without any profit. But this defendant denies that such claim is in point of fact true.

This defendant denies that the rates fixed by said act of 1905 are unreasonably low as against any of said companies or that they will not permit any of them to make a profit upon their state business, or that for that reason said act is invalid as against any of said companies.

He denies that said act, if held valid as to complainant, is unconstitutional because of any alleged discrimination between the complainant and any other persons or corporations operating railroads in this state. He avers that the only discrimination of which the complainant will be allowed to complain, is a discrimination against itself in favor of some other person or corporation; and he denies that any of the provisions of the constitution of the United States or of any of the amendments thereto, are, in any respect, violated by said act.

64 ## XIII.

Further answering and with special reference to the averments of paragraph XIII of complainant's bill of complaint, this defendant denies that said act of 1905, fixes and establishes maximum rates which are unjust, or unreasonable, or unconstitutional, for any reason.

This defendant has no knowledge, information or belief as to whether the cost of transporting live stock is greater than that of any of the other commodities mentioned in said act, or whether the same reduces the rate on said live stock on an average of fifty per cent, or whether the reduction in rates on salt is about thirty-three per cent, and on cement is only about fourteen per cent. He has no knowledge, information or belief as to whether the different articles transported on complainant's railway have been arranged in classes according to cost of carriage, price, risk of injury, bulk, volume of traffic, or any other circumstances, or have remained in substantially the same classes for any period of time, or whether the same has been recognized approved or enacted into law by any statutory classification in effect in Misouri.

He denies that any reduction in rates upon articles affected by said act of 1905 is unequal or partial or arbitrary as compared with any other commodities, or as between the commodities included in said act. Or that the same works any injustice between shippers, purchasers or manufacturers of the state of Missouri, or deprives them of their property without due process of law or deprives them of the equal protection of the laws, or operates to deprive the complainant of its property without due process of law or deprives the complainant of the equal protection of the laws, by any of the methods or for any of the reasons mentioned in said para-
65 graph XIII of the bill of complaint. He denies that the legislature had or established maximum rates or charges for the transportation of all kinds of property, or that even if the legislature had done so, any change effected in such rates by said act of 1905, is presumably unfair or unreasonable in any respect. He denies that the legislature requires the complainant to discriminate in favor of any persons or shippers or to give them a right of transportation for a less rate than the general rate heretofore fixed by any law; or that such rate is less than is just and reasonable in view of the cost to the carrier and the value of the service rendered to the shipper.

XIV.

This defendant further answering avers that he is not a proper party defendant to said bill of complaint, and that the same is wholly without equity as against this defendant.

This defendant, further answering, says that he is informed and believes that this complainant and seventeen other railroad companies or corporations, owning and operating lines of railroad in the State of Missouri, immediately after the approval of said Act of 1905, agreed and came to an understanding with each other, that none of them would comply with the provisions thereof, or transport the commodities named in said Act at the rates mentioned therein, or make any effort to revise their schedule of rates for transporting the commodities mentioned in said Act and other commodities transported by them, in such a manner as to yield obedience to said Act, and at the same time derive a reasonable profit upon the fair valuation of their property necessary to carry on their intrastate business, but determined on concerted action among themselves, to disobey said act, and to deny its validity
66 and any obligation on their part to comply with it, and to bring suits, each of them for itself, on the day said act should take effect, to enjoin the officers of the state from taking any action or discharging any duties which might be imposed upon them by law in respect of said act, and for the further purpose of obtaining a decree of this court adjudging said Act to be null and void upon the grounds stated in this complainant's bill of complaint.

This defendant further avers that in pursuance of said agreement and understanding, this complainant and the said seventeen other companies or corporations did, on the 16th day of June, 1905, each for itself, file in this court its bill of complaint, all of them

being upon substantially the same grounds as those stated in this complainant's bill of complaint, and praying for substantially the same relief, and did on the same day, in each of said suits, obtain from this court a restraining order, directed to and which was served upon the members of said board of railroad commissioners, this defendant and certain persons designated in said bills of complaint as shippers, enjoining this defendant and the said Board from performing any of the duties imposed upon them as state officials, by law, looking to the enforcement of the provisions of said Act, (for the express terms of which said order this defendant prays leave to refer to the same as it appears in the record of this cause), and afterwards, while said restraining order was in force, did obtain from this court a preliminary injunction in the terms of said order, which said preliminary injunction is still operative.

This defendant says that he is informed and believes that the rates fixed by said act of 1905, do not affect all the articles of freight transported by the complainant in its intra-state traffic, but that a very large number of articles, and a very large part of its intra-state traffic, remain wholly unaffected and unregulated as to rates.
67 by said act or by any other existing statute. And this defendant says that the question of whether rates are compensatory or otherwise, can only be determined upon a consideration of a schedule of rates which shall embrace every article and all the freight transported by the complainant in carrying on its intra-state business.

This defendant is informed and believes that the complainant, if it had chosen to do so, instead of attacking the reasonableness or fairness of the rates upon the few articles mentioned in the Act of 1905, might have revised its schedule or tariff of rates upon all the articles of freight transported by it in carrying on its intra-state traffic, including those mentioned in said Act of 1905, in such a manner that the rates for carrying the articles not mentioned in said Act, would have been not unreasonable or unjust, either to itself or to the public, and that the income derived by the complainant for performing the service of transporting freight at the rates and charges fixed in such a schedule, would have been sufficient to assure to the complainant a fair and reasonable return upon the fair value of its property necessarily employed in the carrying on of such intra-state business.

This defendant further avers that the complainant afforded to the board of railroad commissioners, no opportunity, after said act of 1905 took effect, to revise, adjust and fix a schedule of rates upon all the articles of freight transported by the complainant in its intra-state traffic, including those mentioned in said act of 1905, in such a manner that the provisions of said act of 1905, would be observed, and at the same time the rates upon all other articles not mentioned in said act, should not be unreasonable or unjust, either to the complainant or to the public.

This defendant further says that if the complainant had failed to so revise or to attempt to so revise its schedules, the defend-
68 ants, members of such board, would, if they had been given the opportunity, which was denied to them by the injunction

in this cause, in the discharge of the duties imposed on them by law, have attempted to fix and establish such a schedule of rates upon the articles of freight transported by the complainant in its intra-state traffic, as would have observed or complied with the provisions of said act of 1905, and in other respects have been not unjust or unfair either to the complainant or to the public, and he believes that they could have done so.

This defendant furthers says that by the issue of the restraining order and the preliminary injunction in this cause, the members of said Board have been prevented from fixing any such schedule or attempting to fix a schedule of rates which should be just to the complainant and to shippers; that the complainant, by the filing of its bill before they, as such board, could lawfully act in the premises, has unwarrantably assumed that they, as such Board, would fix and establish a schedule of rates which would be unjust to the complainant.

This defendant says that in view of the statutes of this state, which define the duties to be discharged by them, as such Board, this action ought not to be maintained, because it was brought before they had any opportunity to discharge any of such duties, or act in the matter of a general revision of the schedule of rates, made necessary by said Act of 1905.

This defendant denies that the complainant is entitled to any relief whatever against this defendant, without this, that any other matter, cause or thing in the complainant's said bill of complaint, or amendments thereto, contained material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and
69 avoided, or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
Assistant Attorney General,
Solicitors for Defendants.

SANFORD B. LADD,
Of Counsel.

70 Afterwards, to-wit, on the 17th day of February, 1906, a replication was filed.

Said replication is in words and figures as follows:

In the United States Circuit Court for the Western Division of the Western District of Missouri.

In Equity. No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,

vs.

JOHN A. KNOTT et al., Defendants.

Replication of Complainant to the Answer of John A. Knott, Joseph P. Rice, and Frank A. Wightman, Railroad Commissioners.

This replicant, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendants, for replication thereunto saith that it doth and will aver, maintain, and prove its said bill to be true, certain and sufficient in law to be replied unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true: all which matters and things this replicant is ready to aver, maintain and prove as this honorable Court shall direct, and prays as in and by its said bill it hath already prayed.

GEORGE R. PECK,
BURTON HANSON,
FRANK HAGERMAN,
Solicitors for Complainant.

Received a copy of the foregoing replication, and it may be filed as of proper time.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
SANFORD B. LADD,
Solicitors for said Defendants.

71 Afterwards, to-wit, on the 17th day of February, 1906, a replication was filed.

Said replication is in words and figures as follows:

In the United States Circuit Court for the Western Division of the Western District of Missouri.

In Equity. No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,

vs.

JOHN A. KNOTT et al., Defendants.

Replication of Complainant to the Answer of Herbert S. Hadley, Attorney General.

This replicant, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the mani-

fold errors, uncertainties and insufficiencies of the answer of the said defendant, for replication thereunto saith that it doth and will aver, maintain, and prove its said bill to be true, certain and sufficient in law to be replied unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this honorable Court shall direct, and prays as in and by its said bill it hath already prayed.

GEORGE R. PECK,
BURTON HANSON,
FRANK HAGERMAN,
Solicitors for Complainant.

Received a copy of the foregoing replication, and it may be filed as of proper time.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
SANFORD B. LADD,
Solicitors for Defendants.

72 Afterwards, to-wit, on the 17th day of February, 1907, a Decree Pro Confesso as to George Rhodus, et al., was filed. Said decree pro confesso is in words and figures as follows:

In the United States Circuit Court for the Western Division of the Western District of Missouri.

No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY
vs.
JOHN A. KNOTT et al., Defendants.

Decree Pro Confesso.

It appearing that defendants George Rhodus, Francis E. Craig and Robert Keith Furniture & Carpet Company, heretofore entered their appearance herein, but have failed to file any demurrer answer or other pleading within the time required by the rules of this court.

Now, Therefore, on motion of solicitors for complainant, it is ordered that the bill of complaint in said cause be taken pro confesso as to said defendants, in accordance with the rules in such cases made and provided.

GEO. R. PECK,
BURTON HANSON,
FRANK HAGERMAN,
Solicitors for Complainant.

73 Afterwards, to-wit, on the 26th day of February, 1906, a Motion to Refer case to a Master or appoint an Examiner was filed. Said Motion is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,

vs.

JOHN A. KNOTT, JOSEPH P. RICE, and FRANK A. WIGHTMAN, Railroad Commissioners of the State of Missouri; Herbert S. Hadley, Attorney General of the State of Missouri; George Rodus, Frank E. Craig, and Robert Keith Furniture Company, a Corporation, Defendants.

The defendants, John A. Knott, Joseph P. Rice and Frank A. Wightman, Railroad Commissioners of the State of Missouri, and Herbert S. Hadley, Attorney General of the State of Missouri, pray and move the court to make an order referring this cause to one of the standing masters of the court or to a Special Master to be appointed by the court, under proper directions therefor, to take the evidence herein and report the same to the court, with or without findings of fact by such Master, with all convenient speed, or an order appointing an examiner to take the testimony in the cause and return such testimony into court with all convenient speed.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
Assistant Attorney General;
Solicitors for Defendants.

SANFORD B. LADD,
Of Counsel.

74 Afterwards, to-wit, on the 27th day of February, 1906, a motion for Oral Hearing in Open court was filed. Said Motion is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2988.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Complainant,

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, and Joseph P. Rice, John A. Knott, and Frank A. Wightman, Railroad Commissioners of the State of Missouri, et al., Defendants.

No. 2989.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.
Complainant,
vs.
SAME, Defendants.

No. 2990.

THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2991.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Complainant,
vs.
SAME, Defendants.

No. 2992.

THE ST. LOUIS, KANSAS CITY & COLORADO RAILWAY COMPANY,
Complainant,
vs.
SAME, Defendants.

No. 2993.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Complainant.
vs.
SAME, Defendants.

75 No. 2994.

THE ST. LOUIS & HANNIBAL RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2995.

THE MISSOURI PACIFIC RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2996.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
Complainant,
vs.
SAME, Defendants.

No. 2997.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2998.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2999.

QUINCY, OMAHA AND KANSAS CITY RAILROAD COMPANY, Complainant,
vs.
SAME, Defendants.

No. 3000.

THE WABASH RAILROAD COMPANY, Complainant,
vs.
SAME, Defendants.

No. 3001.

THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

76 No. 3002.

KANSAS CITY, CLINTON & SPRINGFIELD RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 3003.

CHICAGO GREAT WESTERN RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 3006.

THE CHICAGO & ALTON RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

Motion.

Complainant in each one of the above entitled causes moves the court to set this case down for hearing upon evidence to be adduced orally in open court on final hearing.

FRANK HAGERMAN,
Solicitor for Complainants.

The above motion may be treated as if separately made and filed in each of above cases, and due and timely notice thereof is acknowledged.

HERBERT S. HADLEY,
JOHN KENNISH,
SANFORD B. LADD,
Solicitors for the Answering Defendants.

77 Afterwards, to-wit, on the 5th day of March, 1906, the following order was filed and entered of record, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO., Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Also

In Equity.

RAILROAD COMPANIES
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

Order.

The application, in the nature of a motion, of the complainants for an oral hearing in open court of the evidence herein, and the motion of the defendants for a reference to a Master or the appointment of an Examiner to take the testimony herein, having been submitted to the court, and the causes being at issue, the court decides to refer the same to a Special Master.

It is accordingly ordered that the above numbered causes be, and they are hereby, referred to Frank L. Scofield, Esq., as Special Master, with directions to take the evidence orally on the issues involved, and to report his findings of facts thereon to the court at the earliest time practicable, together with the evidence in the causes.

(1) He shall so hear, and only until the court otherwise orders, such above numbered causes as the parties by their counsel
78 shall at the beginning of the inquiry agree to be heard.

(2) The Special Master, on reasonable notice, by mail or otherwise, deemed by him most advisable, to the counsel of

the respective parties, shall fix the times and places for the taking of testimony, and he is authorized to fix the same as to him may seem most convenient to the parties in interest, having regard to the suitability and necessity of such times and places.

(3) The Special Master is authorized to employ a competent and reliable stenographer, whose compensation shall be determined by the court, to take down the testimony and reduce the same to writing.

(4) The court directs that the Special Master shall proceed, after the beginning of the taking of testimony, with all reasonable speed, as it is important to all concerned that the hearing of the causes shall be expedited. To this end, the Special Master will require respective counsel to present their testimony promptly, and confine the same to the issues involved, in order to avoid, as far as practicable, the growing evil in practice before Masters of unduly burdening the record with irrelevant and immaterial matters and the litigants with unnecessary costs.

(5) The Special Master shall permit any pleadings to be amended as by Equity Rule provided, and rule upon the admissibility of any evidence, and may refer to the court any question which arises before him in the progress of the hearing.

(6) The Clerk of this court will forthwith furnish the said Special Master with a certified copy of this order, and without further or special order turn over to said Special Master, taking his receipt therefor, any pleadings or court papers pertaining to the causes being investigated by him, on his request made therefor.

(Signed) JNO. F. PHILIPS, *Judge.*

79 Afterwards, to-wit, on the 11th day of June, 1907, a motion for leave to file amended and supplemental Bill of Complaint was filed. Said motion is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO., Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Also

In Equity.

RAILROAD COMPANIES
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

Motion.

Now comes complainant in each of the above entitled causes and moves the court for leave to file an amended and supplemental bill seeking to enjoin the enforcement of the various acts of the legislature regulating rates adopted at the session in 1907, and making as additional parties defendant H. R. Oglesby, Railroad Commissioner, and the county judges and treasurers of the counties through which each of the complainant's lines run, together with citizens traveling upon the road of each complainant as passengers, all as will be more fully shown by the amended and supplemental bill to be presented upon the hearing of this motion.

FRANK HAGERMAN,
Solicitor for Complainants.

80 Afterwards, to-wit, on the 13th day of June, 1907, the following restraining order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Order.

The complainant upon this June 13th, 1907, asked, pending a hearing of the application to file an amended and supplemental bill,

the general form of which has been submitted to the court, the right to temporarily file same and for a restraining order, but in as much as said application to file the bill for a temporary injunction has been set and noticed for hearing upon June 14th, 1907, at the first time convenient to the court, and it appearing to the court that it is desirable that a full argument be had after notice, yet that great harm might be done and much confusion arise if the status quo should be changed, and that it is to the best interest of the public and all parties interested that such status quo should be maintained until such hearing, it is therefore, upon the court's own motion, ordered that until further order herein, the complainant, its officers, agents and employés be and they are hereby restrained from putting in force the maximum freight and passenger rates provided by the legislative acts of 1907 mentioned in said bill and from complying with said acts, and the application for a restraining order will be heard with that for leave to file said amended bill.

(Signed) SMITH McPHERSON, *Judge.*

81 Afterwards, to-wit, on the 14th day of June, 1907, the following order was filed and entered of record, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3004.

CHICAGO, MILWAUKEE & ST. P. RY. CO., Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Order.

The complainant upon this June 14th, 1907, presented its amended and supplemental bill, and asked leave to file the same and for a restraining order or temporary injunction. The Court was advised by the Assistant Attorney General, who appeared, that the Attorney General is absent and desired to be heard, and in the meantime, that suits were this day by the Attorney General instituted in the Circuit Courts of the State to require the various railroad companies of the State to put in force the rates fixed by the acts of the Legislature mentioned in the bill. It is thereupon ordered that the matter be set down for hearing upon the 15 day of June, 1907, at 2 o'clock p. m., and the supplemental bill herein shall be deposited with the Clerk. And it appearing to the court that it is desirable that a full hearing be had of the various matters, yet that great harm might be done and much confusion arise if the status quo should be changed, and that it is to the best interest of the public and all parties interested that such status quo should be maintained until such hearing, it is therefore, upon the Court's own motion, again

ordered that until further order herein, the complainant, its officers, agents, and employés, be and they are hereby restrained from
82 putting in force the maximum freight and passenger rates provided by the legislative acts of 1907 mentioned in said bill and from complying with said acts, and the application for a restraining order and temporary injunction will be heard with that for leave to file said amended bill.

(Signed) SMITH McPHERSON, *Judge.*

83 Afterwards, to-wit, on the 15th day of June, 1907, a Notice was filed. Said Notice is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO., Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Also

In Equity.

RAILROAD COMPANIES
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004 and 3006.

Notice.

To Defendants and their counsel:

Complainants will at the court room at Kansas City, Missouri, upon June 14th, 1907, at ten o'clock A. M., or as soon as counsel can be heard, ask leave of court to file an amended and supplemental bill in each of the foregoing cases, in substantial form shown by copy hereto attached, and at the same time ask for a temporary injunction.

FRANK HAGERMAN,
Solicitor for Complainants.

Received copy of this notice June 11, 1907.

HERBERT S. HADLEY,
Solicitor for Defendants.

84 Afterwards, to-wit, on the 17th day of June, 1907, the following order was filed and entered of record, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Order.

This cause came on for hearing this 17th day of June, 1907, the parties appearing by their counsel in response to notice, and the court being fully advised in the premises, orders and adjudges:

1. Complainant's motion for leave to file an amended and supplemental bill is sustained and such leave is given, the same to be filed as of June 11th, 1907.

Upon such filing, process shall be issued so that if the court hereafter decides that the ends of justice require, and the rules of equity permit, the said bill may be treated as an amended, supplemental, ancillary, dependent or original bill.

To said bill, each of the parties named therein shall be and is hereby made a party.

2. Complainant's application for a temporary injunction is, as to the maximum freight laws of 1907, sustained. Until the further order of court herein, the defendants and each of them are enjoined from doing any act, attempting to recover any penalty, seeking to enforce or having enforced, or asserting any claim or right under or by virtue of either of the maximum freight rate acts of 1907 mentioned in said amended and supplemental bill, to the end that each defendant as to each of said acts of 1907 be restrained as
85 effectually as the defendants were enjoined by the temporary injunction heretofore issued herein as to and in connection with the act of 1905. By consent of complainant, the injunction bond heretofore filed shall stand as applicable to this order, the same as if it were executed and filed this day.

3. As to the passenger act of 1907, the order heretofore entered upon the court's own motion, shall remain in force until June 19th, 1907, at six o'clock a. m., at which time the rates fixed by said act shall be put and kept in force for three months without prejudice to the rights of either party for the purpose of ascertaining more definitely the extent that experience will show that the rates under said act reduce or increase the earnings of complainant.

The court reserves the power upon the application of any person interested, to hereafter make such further or other order upon this subject as it deems proper.

4. Pending the further hearing and final determination of this case, the complainant shall preserve and keep in existence its way-bills for state freight.

(Signed) SMITH McPHERSON, *Judge.*

86 Said amended and supplemental bill of complaint so filed on June 11th A. D. 1907 is in words and figures as follows:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3904.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY CO., Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Complainant's Amended and Supplemental Bill.

To the Honorable Judges of the Circuit Court Aforesaid:

Your orator, by leave of court, brings this, its amended bill and thereupon avers:

1. Upon the 16th day of June, 1905, it filed herein against the defendants in the above entitled case its original bill, (reference to which is now made the same as if copied herein), seeking to enjoin as illegal, unconstitutional and confiscatory the enforcement of the provisions of an act of the legislature of the State of Missouri (herein called the "Act of 1905"), seeking to fix certain maximum freight rates.

2. The said legislature also passed in 1905 an act approved April 14, 1905, in words and figures as follows:

"Corporations, Private: Railroad Classification, Charges—Commissioners.

An Act to Amend Article IV, Chapter 12, of the Revised Statutes of Missouri of 1899, Entitled 'Railroad Classification, Charges, Commissioners,' by adding a New Section Thereto, to Be Known as Section 1195a.

SECTION 1. Fixing charges for carrying undressed stone, crushed rock and building or paving brick.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. That article IV, Chapter 12, of the Revised Statutes of Missouri of 1899, entitled 'Railroad Classification, Charges, Commissioners,' be, and the same is hereby amended by adding a new section thereto, to be known as Section 1195a, to read as follows:

87 SECTION 1195a. No individual, company or corporation owning, operating, managing or leasing any railroad or part of a railroad in this State, shall charge for or receive for carrying a carload of forty thousand pounds of undressed stone, and or building or paving bricks more than forty cents per ton for the first ten miles, twenty cents per ton for the second ten miles, or more than

five cents per ton for each additional ten miles, and any excess in weight shall be charged for at the same rate per ton as for an even carload.

Approved April 14, 1905."

3. Since the filing of said original bill and upon or about January 1, 1907, the office of the said Joseph P. Rice as a railroad and warehouse commissioner expired by limitation of the time for which he was elected and H. R. Oglesby has been duly elected and qualified as his successor, and is now acting as such. It is, therefore, proper that he should be made a party defendant hereto.

4. Each of the railroad companies operating railroads in the State of Missouri at the same time filed in this court original bills to the same purport and for the same purpose, against said members of the Railway and Warehouse Commissioners and the Attorney General and certain shippers upon the line of its road. Such proceedings were had therein that temporary injunctions were issued, the causes were put at issue and duly referred to the Honorable Frank L. Scholfield to take certain proofs and make certain findings of fact. The parties agreed that before taking the evidence in all the cases, they would first take that in three of them, temporarily suspending the taking of further testimony in the others. In accordance with said agreement the evidence was taken in the three cases instituted by the Missouri Pacific, Wabash and Chicago, Burlington & Quincy Railway Companies, and the said causes are now ready for submission to the special master upon the original bills so filed, and have been set for argument before him upon June 18, 1907.

5. The Governor of the State, in giving his written reasons for approving the Act of 1905, indicated that it was with some reluctance that he signed same, expressly stating that "the rate on live stock seems unjust." So at the time of submitting his biennial general message to the 43rd General Assembly of the State, he called attention to the litigation aforesaid, and suggested a modification and amendment of the law to meet fatal defects therein. Thereafter, on February 27, 1907, he sent a special written message to the legislature, in which, among other things, he said in reference to the Act of 1905:

"The statute enacted by the last General Assembly is defective in the penalty clause, which applies only to railroads. The penalty should be made to apply to persons, corporations and partnerships. The cattle clause should be corrected in the light of the testimony adduced in the freight litigation so as to fix these rates at an amount that will stand the test of the judicial crucible."

6. Pursuant to this request and the acknowledgment thus made of the invalidity of the existing law, the enforcement of which was sought to be enjoined by the original bill, the legislature passed an act (herein called the Act of 1907) which will take effect on June 14, 1907, in words and figures as follows:

"Corporations, Private: Railroads—Freight Charges.

An act to repeal an act of the 43rd general assembly, approved April 15, 1905, entitled 'An act to amend chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled "Corporations, private," by repealing section 1194 of said Revised Statutes, being part of article IV of said chapter, concerning railroad classification, charges, commissioners, and to enact in lieu thereof the following new sections providing for the regulation of freight charges by railroads and the recovery of penalties for the violation thereof,' and to repeal an act of the 43rd General Assembly, approved April 14, 1905, entitled 'An act to amend article IV, chapter 12, of the Revised Statutes of Missouri, 1899, entitled "Railroad classifications, charges, commissioners," by adding a new section thereto, to be known as section 1195*a*, fixing the charges for carrying undressed stone, crushed rock and building or paving brick,' and to enact in lieu thereof certain new sections, to be known as sections 1194, 1194*a*-1, 1194*b*-1 and 1194*c*-1, providing for the regulation of freight charges by railroads and prescribing the punishment for a violation thereof, which new sections shall read as follows:

SECTION 1194. Classification and charges for carrying freight in car load lots.
SECTION 1194*a*. Penalty for violation.
SECTION 1194*b*. Not to relieve railroad from complying with other laws.
SECTION 1194*c*. Repealing conflicting acts.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. That sections 1194, 1194*a* and 1194*b* of an act of the 43rd general assembly, approved April 15, 1905, concerning railroad classifications, charges, commissioners, and providing for a penalty for a violation thereof, said sections being enacted in lieu of section 1194, chapter 12 of the Revised Statutes of Missouri, 1899, in "corporations, private," and section 1195*a* of an act of the 43rd general assembly, approved April 14, 1905, concerning railroad classifications, charges, commissioners, fixing charges for carrying undressed stone, crushed rock and building or paving brick, be and the same are hereby repealed, and the following, to be known as sections 1194, 1194*a*-1, 1194*b*-1 and 1194*c*-1 of said Revised Statutes are enacted in lieu thereof.

SECTION 1194. No individual, company or corporation owning, operating, managing or leasing any railroad, or part of railroad, designated in section 1191 as in classes A, B, or C, shall demand, charge or receive a greater or higher rate for carrying from initial to terminal points in this state articles named in the several classes and the commodities herein designated than is hereinafter provided for, namely: Class D, in car loads of 40,000 pounds minimum

weight, not exceeding five cents per one hundred pounds for the first twenty-five miles, and not exceeding one-half cent per hundred pounds for the second twenty-five miles, or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class E, in car loads of 24,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first twenty-five miles, and not exceeding one-half cent per hundred pounds for the second twenty-five miles or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class F, in car loads of 30,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first twenty-five miles, and not exceeding one-half cent per hundred pounds for the second twenty-five miles or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class G, in car loads of 30,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first twenty-five miles, and not exceeding one-half cent per hundred pounds for the second twenty-five miles or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class H, in car loads, in common cars, measuring inside from 29 feet to and including 30 feet and 6 inches in length (to be known as standard cars), not exceeding $8.00 per car load for the first twenty-five miles, and not exceeding $4.00 per car load for the second twenty-five miles or fractional part thereof, and not exceeding $2.00 per car load for each additional twenty-five miles or fractional part thereof of over twelve miles. For the carriage of any of the articles comprising class H, in cars of other lengths for the distances above specified, the following percentages of the foregoing rates per car load shall not be exceeded, namely: In cars of length less than 29 feet, 94 per cent; in cars of length over 30½ feet to and including 32 feet, 104 per cent; in cars of length over 32 feet to and including 33 feet and 9 inches, 107 per cent; in cars of length over 33 feet and 9 inches to and including 36 feet, 110 per cent; in cars of length over 36 feet to and including 38 feet, 113 per cent; in cars of length over 38 feet to and including 40 feet, 116 per cent; in cars of length over 40 feet to and including 42 feet, 125 per cent; in cars of length over 42 feet to and including 44 feet, 135 per cent; in cars of length over 44 feet, 140 per cent of the rates herein specified for cars of the standard length of 29 feet to and including 30 feet and 6 inches shall not be exceeded. All the foregoing lengths to be taken by inside measurements. Class 1, in car loads of 20,000 pounds minimum weight, not exceeding $14.00 per car load for the first twenty-five miles, and not exceeding $2.00 per car load for the second twenty-five miles or fractional part thereof, and not exceeding $2.00 per car load for each additional twenty-five miles or fractional part thereof. For a car load of 40,000
90 pounds of minimum weight undressed stone, crushed rock, sand, railroad ties, cordwood, building or paving brick, not exceeding 40 cents per ton of 2,000 pounds to the ton for the first

fifty miles or fractional part thereof, and not exceeding five cents per ton per car load for the next ten miles or fractional part thereof, and not exceeding 5 cents per ton per car load for each additional ten miles or fractional part thereof. In computing the rate of freight, according to the provisions of this article, the distance shall be computed from the point where it is received to the point of destination in the state, notwithstanding it may pass from one road to another.

SECTION 1194*a*. Any individual, company or corporation owning, operating, managing or leasing any railroad, or part of railroad, designated in section 1194, or any officer, agent, representative or employee thereof who violate the provisions of section 1194, shall be adjudged guilty of a misdemeanor and, on conviction, shall be punished by a fine of not to exceed $5,000.00: Provided, that the money received from any fine under the provisions of this act shall be paid into the school fund in the county in which the case is prosecuted.

SECTION 1194*b*. This act shall not have the effect of relieving any person, partnership or corporation, owning or operating any railroad in this state from any liability or penalty heretofore incurred for failure to comply with any law of this state.

SECTION 1194*c*. All acts and parts of acts, and all rules and regulations, freight schedules, classifications and groupings by railroad companies, or the railroad and warehouse commissioners of this state, in conflict with the provisions of this act, are hereby repealed and declared void.

Approved March 19, 1907."

By this act an attempt was made to comply with the request of the Governor and to repeal the said Act of 1905, together with that mentioned in paragraph 3 hereof, with the exception that no penalty or liability incurred should be affected by such repeal, the purpose and intention of defendants being to attempt to enforce against your orator all penalties which accrued if the said acts are held to be illegal.

7. In addition thereto, the legislature in 1907 passed certain acts which will take effect upon June 14, 1907, being in words and figures as follows:

"Corporations, Private: Railroads—Freight Charges.

An Act to Amend Article 4, Chapter 12, Revised Statutes of Missouri of 1899 by Adding a New Section Thereto, to be Known as Section 1195*a*, and Relating to Freight Charges and Classifications.

SECTION 1. Fixing freight charges on fruits.
SECTION 2. Inconsistent acts repealed.
SECTION 3. Penalty for violation.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. That article 4, chapter 12, of the Revised Statutes of Missouri, 1899, entitled 'Railroad classification, charges, commis-

sioners,' be and the same is hereby amended by adding a new section thereto, to be known as section 1195*a*, which said section shall read as follows:

SECTION 1195*a*. No individual, company or corporation owning, operating, managing or leasing any railroad or part of rail-

91 road in this state, shall charge for or receive for carrying apples and pears in car loads of 24,00[0] pounds minimum weight, more than six cents per hundred pounds for the first twenty-five miles or fractional part thereof, and not more than one cent per hundred pounds for each additional twenty-five miles or fractional part thereof. For strawberries, peaches, grapes and other berries in car loads of 18,000 pounds minimum weight, not exceeding fifteen cents per hundred pounds for the first twenty-five miles or fractional part thereof, and not exceeding two cents per hundred pounds for each additional twenty-five miles or fractional part thereof.

SEC. 2. All acts and parts of acts and all rules and regulations, freight schedules, classification[s] and grouping[s] by railroad[s] companies, or the railroad and warehouse commissioners of this state, in conflict with the provisions of this act, are hereby repealed and declared void.

SEC. 3. Any individual company or corporation owning, operating, managing or leasing any railroad or part of a railroad in this state, violating the provisions of this act, shall, on conviction, be adjudged guilty of a misdemeanor, and subject to a fine of not to exceed one thousand dollars for each offense.

Approved March 19, 1907."

"Corporations, Private: Railroads.

An Act to Provide Transportation on Railroads for the Shippers of Freight in this State in Carload Lots.

SECTION 1. Railroads to issue to certain shippers transportation.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. Whenever any railroad company or corporation doing business within the limits of this state shall receive any live stock to be shipped over the said road or roads by carload lots, said corporation shall, in consideration of the price paid for said carload lots, issue to the shipper, his agent or employee, at the time of making out the contract or bill of lading, a round trip ticket to and from said points designated in said bill of lading, without further expense to said shipper, provided that the points of destination are within this state, and in case said point of destination is without this state, then said railroad corporation shall issue to such shipper, his agent or employee, a round trip tricket to a point within this state nearest to the point without this state to which said shipment of live stock is shipped: Provided, that in case said shipper shall ship more than one car load at any one shipment the said railroad corporation shall not be compelled to give to said shipper more than one round trip

ticket with such shipment, which said ticket shall be good on the freight train on which said stock is shipped, and on all trains on said road carrying passengers on the return trip, and shall be good for a period of ten days, and any railroad company or corporation willfully violating the provisions of this section, or which shall fail, neglect or refuse to furnish and deliver such ticket to such shipper, his agent or employee, shall forfeit and pay, as a penalty, to said shipper, not less than three hundred dollars nor more than five hundred dollars, to be recovered by civil action in any court of competent jurisdiction.

Approved April 4, 1907."

8. All the averments of the original bill apply to the said Act of 1907 and also to each of the acts mentioned in paragraph 7 hereof, except that if for the classes of freight mentioned in the said
92 Acts of 1907 alone, or in all the Acts of 1907, your orator should charge the maximum rate therein authorized and practically capable of being charged, its total gross receipts from state traffic would be reduced in a very large sum, which though differing in items would not be as a whole substantially less than that mentioned in the original bill as to the Act of 1905. Each of said freight Acts of 1907 is violative of the provisions of the constitution to the same extent as was alleged as to the Act of 1905. But the freight Acts of 1907 did not so correct the evils of the former laws as set forth in the original bill, and the rates were thereby fixed at amounts that were unreasonable, and confiscatory, and less than the cost of the service.

9. The Governor in calling for the passage of said Act of 1907, and the legislature in passing the same, did so for the avowed purpose of increasing certain of the maximum rates of the Act of 1905 which they conceived had in this litigation been proved to be unreasonable and confiscatory and could not be enforced. Notwithstanding this, the rates as finally so fixed, considered alone, were not upon such a basis as would return any reasonable or fair compensation to the complainant upon the value of that portion of its property devoted to such use. Even if the laws in existence in 1905 relative to passenger fares, had remained in force, still the freight rates as fixed by the said Acts of 1907 would have been unreasonable and confiscatory, and would not have given any just return upon the value of that portion of your orator's property as a whole devoted to state traffic. However, the legislature of the state, without any fixed or definite knowledge upon the subject of rates, erroneously conceived that if the increase as aforesaid in the freight rates were necessary and were made, there could be a general equalization of rates by a decrease in the passenger rates and so in substance they could legally overcome and offset any advantage from the increase in freight rates by decreasing the maximum rates to be charged for state passenger traffic about thirty-three and one-third
93 per cent, and thus, while defeating pending litigation, the public as a whole would not be the loser. The result was that at the same session, and as part and parcel of one transaction, and substantially as one law, and to accomplish such purpose, there was

passed and the Governor approved, an act herein called the "Passenger Act," which, if valid, will take effect on June 14, 1907. The same reads as follows:

"Corporations, Private: Railroads—Passenger Rates.

An act to repeal sections 1191 and 1192 of chapter 12, article 4, Revised Statutes of Missouri, 1899, entitled 'Railroad classification—charges—commissioners,' by striking out sections 1191 and 1192 and enacting the following new sections in lieu thereof, to be known as sections 1191 and 1192 and 1192*a*.

SECTION 1191. Classification of railroads.
SECTION 1192. Passenger charges regulated.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. That all of sections 1191 and 1192 of chapter 12, article 4 of the Revised Statutes of Missouri, 1899, be and the same are hereby repealed and three new sections be enacted in lieu thereof, to be known as sections 1191 and 1192 and 1192*a*, so that said sections shall read as follows:

SECTION 1191. Roads classified.—All railroads in the state of Missouri are hereby divided into four classes, to be known as class A, class B, class C and class D. Class A shall include all through or trunk line railroads and all branch roads owned, leased, controlled or occupied by such through or trunk line railroad companies or corporations. Class B shall include all other railroads or parts of railroads owned, leased, controlled or occupied, or which may hereafter be owned, leased, controlled or occupied, either wholly or in part, by any trunk line company or corporation. Class C shall include all other railroads of a greater length than forty-five miles. Class D shall include all roads less than forty-five miles in length not owned, leased, controlled or occupied by any trunk line company or corporation.

SECTION 1192. Passenger charges regulated.—Any individual, company or corporation owning, operating, controlling or leasing any railroad or part of a railroad in this state, in the several classifications as herein prescribed, shall be limited to a compensation per mile, for the transportation of any person with ordinary baggage not exceeding one hundred pounds in weight, as follows: In classes A, B and C, not exceeding two cents per mile, and in class D, not exceeding four cents per mile: Provided, that no such individual, company or corporation shall charge, demand or receive any greater compensation per mile for the transportation of children of the age of twelve years or under than one-half of the rate above prescribed; and provided further, that the rates for transportation herein prescribed may be reduced, as hereinafter provided.

SECTION 1192*a*. Any individual, company or corporation, or any agent or officer thereof, who shall violate any of the provisions of section 1192 of this act, shall be deemed guilty of a misdemeanor,

and upon conviction, shall pay a fine of not less than one hundred nor more than five hundred dollars.

Approved February 27, 1907."

10. All the averments of the original bill apply to said Passenger Act. It is violative of each constitutional provision men-
94 tioned, and subject to each objection made, in the original bill to the Act of 1905, and all the facts there averred as to why the Act of 1905 should be held to be void and action thereunder restrained, are not only true as to the Acts of 1907 but also as to said Passenger Act. If enforced, it will reduce the earnings of your orator from said passenger business in the practical and ordinary operation of its road, substantially one-third. The state passenger earnings for the year 1906 were in the aggregate substantially $261,717.62 *dollars*, and yet, if the Passenger Act as aforesaid had been applied thereto, said earnings would have been reduced at least to the sum of $174,478.41 *dollars*, or an annual loss of $87,-239.21 *dollars*. The property of your orator in the state is used as a whole both for state and interstate freight and passenger business, and, as such, is quite valuable. The value of that portion devoted to the carriage of state business, considered as a whole, or separately as to the passenger business only, is such that in either case the reduction in rates by said Passenger Act would not only fail to make any reasonable return on such valuation, but would cause such business to be done at an actual loss.

11. The said Passenger Act was passed for the avowed purpose of reducing the state passenger rates of your orator so as to offset and overcome a supposed increase of certain of the state freight rates made under the Act of 1907, and the attempt was made to frame each act so as to avoid the injunctive relief in this and in each action heretofore instituted by the other railroad companies operating lines in Missouri. As your orator is informed and believes, the state and defendants now unjustly and improperly claim that since upon the face of these acts provision is only made for general penalties, there is no remedy by injunction; that the original bill can no longer be maintained, and that the state through its officers is entitled
95 to have enforced the various statutory penalties for each shipment made and each passenger carried at a rate in excess of that fixed by the freight Acts of 1907 and the said Passenger Act, as well as penalties under the abandoned Act of 1905.

As to the said contentions, your orator respectfully submits:

(*a*) Such view, if adopted, would result in a multiplicity of suits, the harassment of your orator, and tedious and expensive litigation, because if an injunction be not herein granted, and said acts be not complied with, many suits and prosecutions will be brought and many fines and penalties imposed and no opportunity will be afforded to your orator to present its claim of the unconstitutionality of said act and the confiscatory nature of the rates fixed. Such an inquiry involves the examination of long and tedious accounts, the study of books and papers and an expert knowledge of the trier of fact, none of which could be properly had in the many trials to be

had in a court of law to enforce the penalties. Hence the result would be pending the inquiry, your orator would be required to put in and enforce said rates to its irreparable damage, because it would be compelled, pending the litigation, to carry traffic at the reduced rates with no practicable way of recovering the difference between the rates now charged and as so reduced.

(*b*) The real purpose of the original bill was to determine whether that portion of the property of your orator devoted to state business could, if the Act of 1907 were enforced, receive such return upon its value as would be fair, reasonable and not confiscatory. Upon the trial of the three cases heard by the special master, such was the theory adopted by both parties, and the proofs were by both of them directed to that end. In view of this situation, it is respectfully submitted that the full determination of all questions of rates in the pending cases can not be defeated or impaired by the repeal by the state legislature of the particular act questioned by the orignal bill and the passage of another and different act in such
96 form as to prevent any adequate relief from a court of equity and to remit a complainant to a defense in numberless actions of law to recover penalties. But if the rights of the parties should be ascertained by a court of equity, this can be done adequately through the injunctive process, surrounded and controlled by such conditions as may be proper and just in the premises.

(*c*) It would be unjust and inequitable to permit officers of the state to claim that the validity of an act alleged to be confiscatory in its nature should be determined in a way other than would afford a full and fair hearing, which can only be by the processes of a court of equity. In order that there may be the fullest and fairest hearing of the controversy, your orator consents that any state officer, or any private person or corporation may appear herein and show, if they can, why the rates fixed in the acts aforesaid are lawful, reasonable or enforcible, and that the court may make any reasonable order to protect the public and speed the hearing.

(*d*) Each of the special duties devolving upon the members of the Board of Railroad Commissioners and the Attorney General, as stated in the original bill, applies to the Acts of 1907 and the Passenger Act aforesaid, so that even as an original bill, this proceeding could be maintained.

(*e*) The constitution of the state provides that all penalties such as are attempted to be prescribed for the violation of the acts herein mentioned go to the school-fund of the various counties, and the statutes of the state impose the special duty of collecting the same and preserving and investing the proceeds thereof, upon the county court and the treasurers of the respective counties of the state Joseph M. Patterson, Charles E. Moss, and George Dodd are the judges of the county, and Arthur C. Warner is treasurer, and each is a resident and citizen of the county of Jackson State of Missouri through
97 which the line of your orator passes, and from and to which there is transported a very large part of the state and passenger traffic, the maximum rates for carriage of which are fixed by said Acts of 1907 and said Passenger Act. Each of said judges and

said treasurer is hereby made a defendant. Each proposes and intends and will, unless restrained herein, seek to enforce and collect the penalties provided for in the said acts. In view of the fact that the line of your orator's road is not confined to one county, it is inconvenient, impracticable, expensive, and hence, unnecessary to make the county judges and the treasurer of each county parties hereto, but such as are named can be, and are sued as a class so that others similarly situated may, if they desire, appear herein and be heard upon their own behalf or through those now made parties, or, if necessary, be brought in by process of court and required to make defense.

(*f*) Julius H. Lang and Charles A. Kirtley are citizens and residents of Kansas City, Jackson county, Missouri, who constantly travel over your orator's road, who have demanded and supported the passage of the Passenger Act aforesaid, and threaten to and will seek to enforce its provisions unless the rates therein fixed are established and put in force. They are hereby made defendants, and they represent a class of passengers and travelers so numerous that it is impracticable to join them all, and those named are made defendants herein for the purpose of determining, as against your orator, the rights of the entire traveling public under the said Passenger Act.

12. The rates fixed by each the said Acts of 1907 and said Passenger Act and as a whole are so unreasonable and confiscatory that a compliance therewith will force an unreasonable reduction and confiscation of your orator's entire revenue contrary to the provisions of the fourteenth amendment to the constitution of the
98 United States and provisions of the constitution. Besides this, to enforce the rates so fixed in any of said acts would necessarily affect the interstate rates upon the same commodities. Owing to the peculiar geographical location of the state of Missouri, the state rates necessarily affect all interstate rates upon the same commodities and travel and this results as a practical and unavoidable matter in the conduct of business affairs, the location of markets, business houses, the extent of territorial distribution from the various cities in the state and the necessities of travel. In addition to this some of the chief lines of railroad in Missouri, in running to and from points therein, pass out of the state so as to make any transportation between such points interstate commerce. Hence when a state rate between such points when lines wholly within the state is fixed lower than the interstate rate the companies whose transportation is interstate must meet that rate or carry none of the traffic. Such traffic constitutes a very substantial portion of the entire state traffic. Congress has attempted to legislate upon the subject of interstate rates, and since, as a matter of fact, none of said state rates can be enforced without affecting interstate rates, all of the said legislative acts are unconstitutional and void and of no effect and violative of section 8, article 1 of the Constitution of the United States.

In consideration whereof, and forasmuch as your orator is remedi-

less in the premises and by the strict rules of the common law can only have relief in a court of equity where matters of this kind are properly cognizable and relievable, your orator prays that: (1) Each of the said Acts of the Legislature of Missouri of 1907, herein set forth, including said Passenger Act, be declared unconstitutional, unenforcible and not binding upon your orator. (2) All the relief asked in the original bill as to the Act of 1905 be granted as to the said Acts of 1907. (3) The temporary injunction heretofore issued herein be extended against the defendants to the original and to this bill so as to cover and include any claim or right under
99 or by virtue of any of said freight Acts of 1907 and said Passenger Act and be made permanent. (4) Your orator have such other and further relief as is just and equitable.

And may it please your Honors to grant unto your orator a writ of subpœna of the United States, issuing out of and under the seal of this honorable court, directed to each of the said defendants, including each of those hereby and herein made a party defendant, commanding them and each of them on a day certain therein to be named and under a certain penalty, to be and appear before this honorable court then and there to answer, but not under oath, an answer under oath being expressly waived, all and singular the premises and to stand to, perform and abide by such order, direction and decree as may be made against them in the premises.

And your orator will ever pray, etc.

BURTON HANSON,
FRANK HAGERMAN,
Solicitors for Complainant.

BURTON HANSON,
Of Counsel.

STATE OF ILLINOIS,
County of Cook, ss:

I, James H. Hiland, upon oath, say that I am Third Vice-President of complainant in above entitled bill, and as such am familiar with the traffic operations of said company, and all the matters and things mentioned in the said bill which I have read. I know the contents thereof and same are true of my own knowledge, except as to those matters therein stated upon information and belief, and as to those matters, I believe them to be true.

JAMES H. HILAND.

Subscribed and sworn to before me this 12th day of June, 1907.
My commission expires May 11, 1908.

[SEAL.] W. D. MILLARD,
Notary Public.

Afterwards, to wit, on the 25th day of June, A. D. 1907, a writ of subpœna was issued.

100 Afterwards, to-wit, on the 15th day of July, 1907, the following order was filed and entered of record, to-wit:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Order.

This cause coming on for hearing this July 15th, 1907, leave is hereby given to complainant to file an Amendment to Complainant's Bill of Complaint. The application for a temporary injunction against Herbert S. Hadley, Attorney General of the State of Missouri, from prosecuting the suit in the state court which he has instituted against the complainant is continued until the expiration of the ninety days' test heretofore ordered, unless the court should hereafter set the same down for hearing at an earlier date.

(Signed) SMITH McPHERSON, *Judge.*

101 Afterwards, to wit, on the 16th day of July, A. D. 1907, an amendment to complainant's bill of complaint was filed. Said amendment is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO., Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Amendment to Complainant's Bill of Complaint.

The complainant, by leave of court, presents this its amendment to the bills heretofore filed herein, and respectfully shows to the court that it desires to, and does hereby present the matters and things hereinafter set forth, as paragraphs 13, 14, 15, 16, 17, 18, 19, 20 and 21, of the amended and supplemental bill heretofore filed herein, to be inserted therein immediately following paragraph 12 and preceding the prayer thereof. Thereupon complainant avers:

13. It hereby refers to the original and to the amended and supplemental bills herein, with the same force and effect as if copied herein.

14. Conceiving, and the defendants insisting, that an additional amended and supplemental bill should only be filed after notice, and upon order of court, and there being no judge of the court within the district at the time, the complainant filed herein, on June 11th, 1907, its written application for leave to file an amended and supplemental bill, reference to which application is made the same as if copied herein. On the same day, there was served upon
102 counsel for defendants in the original bill, and accepted by them, a written notice, together with a copy of the form of the said amended and supplemental bill, which notice recited that the application to file same, and for a temporary injunction would be presented to the court upon June 14, 1907, at the opening of the court at ten o'clock a. m. Said notice, the acceptance and evidence of service thereof, and form of bill, are upon file and are hereby referred to with the same force and effect as if set out herein. On June 13, 1907, at ten o'clock a. m., there then being a judge of the court within this district, and court being open, complainant presented and asked, pending a hearing of the application to file its amended and supplemental bill the general form of which was then submitted to the court, the right to temporarily file same, and for a restraining order, whereupon the court made an order entered herein upon June 13, 1907, of its own motion in the interests of the public and of all parties, maintaining the status quo pending the hearing, and restraining complainant from putting in force the maximum freight and passenger rates provided by the legislative acts of 1907 mentioned in said bill, and from complying with said acts, reference to said order is now made as fully as if copied herein.

15. Afterwards, on June 14, 1907, Herbert S. Hadley, Attorney General of the State of Missouri, and one of the defendants herein, by his counsel, in flagrant disregard and contempt of the jurisdiction of this court, filed in the circuit court of Kansas City, Missouri, his two petitions in equity in the name of the state at his relation as Attorney General, against this complainant, one asking that the court by mandatory injunction require complainant to put in force the maximum freight rates provided by the said legislative acts of 1907 mentioned in the amended and supplemental bill, and to comply with said acts, and the other as asking the same relief as to the rates fixed by the Passenger Act of 1907. And
103 at his solicitation, the judge of said state court did, in each of said cases, the same day, without notice, issue restraining order returnable upon the 18th day of June, 1907, requiring the forthwith doing of such acts by this complainant.

Complainant asks leave to produce upon the hearing of this petition, certified copies of said proceedings in the state court, and refer to them as fully as if copied herein.

16. Thereafter at the time fixed in said notice, and upon June 14, 1907, at ten o'clock a. m., there was presented to this court the applications of complainant for leave to file said amended and sup-

plemental bill and for a temporary injunction, and defendants asked a continuance of the hearing for one day, which the court granted, and upon its own motion ordered that said amended and supplemental bill should be deposited with the clerk (which was then and there done), that in the interest of the public and all parties the status quo should be maintained, and that complainant in the meantime and until the further order of court should be restrained from putting in force the maximum freight and passenger rates fixed by the legislative acts of 1907 mentioned in the said bill, and from complying with said acts. A reference to the said order is now made with the same force and effect as if copied herein. In the meantime the said restraining orders from the state court were served upon complainant. Thereafter, upon June 15, 1907, the said applications were by the counsel for the respective parties and by this court, taken under advisement.

17. Thereafter upon June 17, 1907, this court made and entered an order which, omitting title, is in words and figures as follows:

Order.

"This cause came on for hearing this 17th day of June, 1907, the parties appearing by their counsel in response to notice, and the court being fully advised in the premises, orders and adjudges:

1. Complainant's motion for leave to file an amended and supplemental bill is sustained and such leave is given, the same to be filed as of June 11th, 1907.

Upon such filing process shall be issued so that if this court
104 hereafter decides that the ends of justice require, and the rules of equity permit, the said bill may be treated as an amended, supplemental, ancillary, dependent or original bill.

To said bill, each of the parties named therein shall be and is hereby made a party.

2. Complainant's application for a temporary injunction as to the maximum freight laws of 1907, sustained. Until the further order of the court herein, the defendants and each of them are enjoined from doing any act, attempting to recover any penalty, seeking to enforce or having enforced, or asserting any claim or right under or by virtue of either of the maximum freight rate acts of 1907 mentioned in said amended and supplemental bill, to the end that each defendant as to each of said acts of 1907 be restrained as effectually as the defendants were enjoined by the temporary injunction heretofore issued as to and in connection with the act of 1905. By consent of the complainants, the injunction bond heretofore filed shall stand as applicable to this order, the same as if it were executed and filed this day.

3. As to the passenger act of 1907, the order heretofore entered upon the court's own motion shall remain in force until June 19th, 1907, at 6 o'clock a. m., at which time the rates fixed by said act shall be put and kept in force for three months without prejudice to the rights of either party for the purpose of ascertaining more definitely the extent that experience will show that the rates under said act reduce or increase the earnings of complainant.

The court reserves the power, upon the application of any person interested, to hereafter make such further or other order upon this subject as it deems proper.

4. Pending the further hearing and final determination of this cause, the complainant shall preserve and keep in existence its way-bills for state freight.

SMITH McPHERSON, *Judge.*"

Accordingly said bills were forthwith marked filed as of June 11, 1907, as in and by said order provided. Subpœnas have been duly issued as in and by said order provided, and served upon most of the defendants, and as to the others are in the marshal's hands for service and not yet returned, and complainant is not yet advised as to whether actual personal service has been had.

18. Thereafter upon June 18, 1907, the circuit court of Jackson County, Missouri, upon the application of the said Attorney General entered an order dismissing the case mentioned in paragraph 15 hereof which was filed against this complainant for a mandatory injunction to require it to put in force the maximum freight rates provided by the said legislative acts of 1907, and upon the same day the same court, upon the application of the said Attorney General, entered an order setting aside the restraining order issued in the case mentioned in the same paragraph to require it to put in force the maximum passenger rates fixed by the legislative act of 1907
196 aforesaid, but did not dismiss the case, the Attorney General insisting that it should remain pending. He now threatens to and he will, unless enjoined herein, proceed with the trial and prosecution of the same on and after September 20, 1907, at the expiration of the ninety day test mentioned in the order hereinbefore set out.

19. The said state court has no jurisdiction in the premises and has no right or power to compel complainant by injunction to put in force the maximum passenger rates aforesaid, and any attempt so to do would deny to complainant the protection accorded to it by the fourteenth amendment to the constitution of the United States, which it now claims. Such attempt to oust this court of its jurisdiction, is in contempt thereof, and as to it was and is futile.

20. With the exception hereinafter stated, the facts alleged herein in paragraphs 13 to 18 inclusive, are true as to each of the following railway companies in the state of Missouri; St. Louis & San Francisco; Atchison, Topeka & Santa Fe; St. Louis Southwestern; Chicago, Rock Island & Pacific; St. Louis, Kansas City & Colorado; Kansas City Southern; St. Louis & Hannibal; Missouri Pacific; St. Louis Iron Mountain & Southern; Missouri, Kansas & Texas; Chicago, Burlington & Quincy; Quincy, Omaha & Kansas City; Wabash; St. Joseph & Grand Island; Kansas City, Clinton & Springfield; Chicago Great Western; Chicago, Milwaukee & St. Paul, and Chicago & Alton. Each of said companies had at the same time filed in this court bills similar in nature to the original bill herein to enjoin the enforcement of the Acts of 1907, in which temporary injunctions had been issued and which cases are still pending and undetermined. Said exception is that the cases in the state court mentioned in para-

graph 15 hereof against the St. Louis & San Francisco Railroad Company; St. Louis Southwestern Railway Company; St. Louis, Kansas City & Colorado Railway Company; St. Louis & Hannibal Railway Company; Missouri Pacific Railway Company; St. Louis Iron Mountain & Southern Railway Company; Missouri, Kansas & Texas
106 Railway Company and the Wabash Railroad Company, were filed in the circuit court of St. Louis, Missouri, while those against the other companies were filed in the circuit court of Jackson County, Missouri, at Kansas City. With this exception, similar action to that herein averred was taken in each case pending in this court, and the Attorney General threatens to and unless restrained will, proceed to prosecute each of said cases in the state courts as hereinbefore alleged. As to several of said complainants, the restraining orders from the state courts were served while the parties were presenting said applications upon June 14.

21. The passenger act of 1907, and each freight act of 1907, is void and of no effect for that it is an attempt to deprive complainant of its property without due process of law, and denies to complainant the equal protection of the law for reasons additional to those heretofore given, in that:

(*a*) Harsh and unreasonable penalties are provided with no provision for a test of the validity of the act, except at the risk of incurring such penalties which, if applied to each shipment of state freight or each passenger traveling on a state journey, over complainant's line, would within two years be greater than the value of complainant's whole property devoted to such use.

(*b*) It directly influences, affects and bears upon interstate freight and passenger traffic and fixes and regulates the same, for these reasons additional to those heretofore given:

(1) Many of the companies operate lines between the large cities of the state, some of which are wholly within the state and some of which go out of the state into Kansas and then back into this state. For illustration: The Kansas City, Clinton & Springfield Railway Company and the St. Louis & San Francisco Railroad Company are trunk lines between Kansas City, Missouri, and Springfield, Missouri, of substantially the same length; the line of the former
107 between those points extending into and out of Kansas, so that all its carriage between said points is interstate; the other company has one line which in said course runs into and out of a portion of Kansas, and another separate line between said points which extends wholly through Missouri so that the carriage between said points upon one line is interstate and upon the other, state. Between Joplin and Kansas City there are three trunk lines of substantially the same length, that of the Missouri Pacific Railway Company between said points being wholly within the state and therefore all of its traffic is state, while the lines of the Kansas City Southern Railway Company and the St. Louis & San Francisco Railroad Company between said points extend into and out of Kansas, so that all the traffic between said points is interstate. Between St. Louis, Missouri, and St. Joseph, Missouri, there are two trunk lines, one of which is that of the Chicago, Burlington & Quincy Railway Com-

pany, which does not pass out of the state, so that the traffic between said points upon that line is wholly state, the other line is that of the Missouri Pacific Railway Company which in its course passes into and out of Kansas, so that the entire traffic between said points is interstate. Between Kansas City, Missouri, and St. Joseph, Missouri, there are four trunk lines of substantially equal length, those of the Chicago, Burlington & Quincy Railway Company and the St. Joseph & Grand Island Railway Company are wholly within Missouri and all their traffic between said points is state; the lines of the Missouri Pacific Railway Company and of the Chicago Great Western Railway Company pass into and out of Kansas, so that the entire traffic thereon between said points is wholly interstate.

The said five cities are the largest in the state, their populations, according to the census of 1900 being, St. Louis 575,238; Kansas City, 163,752; St. Joseph, 102,979; Joplin, 26,023; Springfield, 23,267.

The traffic between said cities upon said lines is a very substantial part of the traffic of said lines and of the state;
108 the rates between the points as aforesaid, both for passenger and freight, upon those lines which are interstate, have been for years fixed at a reasonable sum which is much higher than the rates fixed by any of the acts of the legislature in question. If any of the rates mentioned in said acts be put in force between said points upon lines wholly within the state, each of the companies operating the lines which are interstate will necessarily be compelled to lower their rates to the same figure or else, as a matter of fact, none of the traffic between said points will be carried over its line.

(3) The large cities and populous communities of the state are upon its eastern and western borders; the main course of traffic through the state is east and west; all the railroads in the state either operate lines extending into other states, or into the state of Kansas adjoining Missouri upon the west, and Illinois adjoining it upon the east, or else have joint freight and passenger traffic arrangements with lines running into those states for interstate through carriage both of freight and passengers.

So far, pending the test of the passenger rate ordered by this court, it has been demonstrated and is the fact, that the interstate passenger rates are much higher than those fixed by the passenger act of 1907, so that passengers starting from points in Missouri to go to other states buy tickets at two cents a mile to the last station in Missouri upon its border, and then buy tickets or pay fare from thence to their interstate destination, and vice versa from points of interstate trip into Missouri. For illustration a concrete case may be stated. From St. Louis to Kansas City is about 275 miles, thence to Topeka, Kansas, 67 miles, or a total of about 342 miles. The fair and reasonable interstate rate is and has for years been $9.50. A passenger starting from St. Louis may and does, buy his ticket to Kansas City, 275 miles at two cents a mile, or $5.50; he then buys his ticket to Topeka, 67 miles, at three cents a mile or $2.00, making a total from St. Louis to Topeka of $7.50, thus saving to himself and losing to the
109 carrier the difference between $9.50 and $7.50, or $2.00. This illustrates the situation upon other lines in the state, so

that as a matter of fact it is true that in a state located as the state of Missouri is, the lowering of the rate upon the state traffic below that of the interstate necessarily affects, fixes and lowers the interstate rate in the manner herein stated. The same thing is true of the freight traffic (though not in this respect in as pointed a degree), because the same practice can, is and will be adopted as to freight.

Wherefore, complainant prays, as heretofore prayed, and asks that the defendants be required to also answer this amendment, but an answer under oath is waived, and in addition to the relief heretofore asked, complainant asks that Herbert S. Hadley, Attorney General of the State of Missouri, be temporarily and permanently enjoined from prosecuting the said suit in the state court which he has instituted against the complainant.

And your orator will ever pray, etc.

FRANK HAGERMAN,
Solicitors for Complainant.

BURTON HANSON,
Of Counsel.

STATE OF ILLINOIS,
County of Cook, ss:

I, J. H. Hiland upon oath say that I am the 3rd Vice President of complainant in the above entitled cause, and as such am familiar with the traffic questions of said company, and all the matters and things mentioned in said amendment which I have read; I know the contents thereof and the same are true of my own knowledge, except as to those stated upon information and belief, and as to those matters, I believe them to be true.

J. H. HILAND.

Subscribed and sworn to before me this 1st day of July, 1907.
My commission expires May 11, 1908.
[SEAL.]

W. D. MILLARD,
Notary Public.

110 Afterwards, to-wit, on the 16th day of July, 1907, an Acknowledgment of Service of Subpœna was filed. Said Acknowledgment of Service of Subpœna is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Acknowledgment of Service of Subpœna.

Service of the subpœna issued herein upon June 25, 1907, is acknowledged with the same force and effect and no more than if served by the proper officer.

HERBERT S. HADLEY,
Attorney General,
Solicitors for Railroad Commissioners, Including H. R. Oglesby, and Herbert S. Hadley, Attorney General.

111 Afterwards, to-wit, on the 16th day of July, 1907, an Acknowledgment of Service of Subpœna was filed. Said Acknowledgment of Service of Subpœna is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Acknowledgment of Service of Subpœna.

Service of the subpœna issued herein upon June 25, 1907, is acknowledged with the same force and effect and no more than if served by the proper officer.

FRANCIS E. CRAIG.

112 Afterwards, to-wit, on the 16th day of July, 1907, an Acknowledgment of Service of Subpœna was filed. Said Acknowledgment of Service of Subpœna is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Acknowledgment of Service of Subpœna.

Service of the subpœna issued herein upon June 25, 1907, is acknowledged with the same force and effect and no more than if served by the proper officer.

ROBERT KEITH FURNITURE & CARPET CO.
F. W. BIGGAR, *Secty. & Treas.*

113 Afterwards, to-wit, on the 16th day of July, 1907, an Acknowledgment of Service of Subpœna was filed. Said Acknowledgment of Service of Subpœna is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Acknowledgment of Service of Subpœna.

Service of the subpœna issued herein upon June 25, 1907, is acknowledged with the same force and effect and no more than if served by the proper officer.

J. H. LANG.
CHARLES A. KIRTLEY.

114 Afterwards, to-wit, on the 31st day of July, 1907, an Acknowledgment of Service of Subpœna was filed. Said Acknowledgment of Service of Subpœna is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Acknowledgment of Service of Subpœna.

Service of the subpœna issued herein upon June 25, 1907, is acknowledged with the same force and effect and no more than if served by the proper officer.

CHARLES W. GERMAN,
County Counselor,
Solicitors for Joseph M. Patterson, Charles E. Moss and George Dodd, County Judges of Jackson County, Mo., and Arthur C. Warner, County Treasurer of Jackson Co., Mo.

115 Afterwards, to wit, on the 2nd day of August, A. D. 1907, the joint demurrer of John A. Knott et al., was filed. Said demurrer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3004.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

The Joint Demurrers of the Above-named Defendants, John A. Knott, Frank Wightman, and H. R. Oglesby, Railroad Commissioners of the State of Missouri, to the Amended and Supplemental Bill of Complaint, as Amended.

First. These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's amended and supplemental bill of complaint as amended to be true in manner and form as the same are therein and thereby set forth and alleged, doth demur thereto and for cause of demurrer show:

1. That the said complainant has not, in and by said amended and

supplemental bill of complaint, as amended, made or stated any such cause as doth or ought to entitle it to the relief thereby sought and prayed for, from or against this defendant or to any relief whatsoever.

2. It appears upon the face of complainant's amended and supplemental bill of complaint as amended that the complainant has an adequate remedy at law.

3. The matters and things set forth in complainant's amended and supplemental bill of complaint, as amended, are not nor are any of them germane to or supplementary of the original bill in this case.

116 4. If the matters and things set forth in complainant's amended and supplemental bill of complaint, as amended, entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action, not connected with or dependent upon the cause of action set forth in the original bill.

Second. These defendants further demur to the fifth, sixth, seventh and eighth paragraphs of the complainant's amended and supplemental bill of complaint, as amended, because (*a*) the same are not germane to or supplementary of the original bill herein; (*b*) if the matters and things set forth in said paragraphs entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action not connected with or dependent upon the cause of action set forth in the original bill; (*c*) the matters and things set forth in said paragraphs do not entitle complainant to the relief prayed for, or to any relief whatsoever.

Third. These defendants further demur to the ninth and tenth paragraphs of the complainant's amended and supplemental bill of complaint, as amended, because (*a*) the matters things set forth in said paragraphs are not germane to or supplementary of the original bill herein; (*b*) if the matters and things set forth in said paragraphs entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action not connected with or dependent upon the cause of action set forth in the original bill; (*c*) the matters and things set forth in said paragraphs do not entitle the complainant to the relief prayed for, or to any relief whatsoever.

Fourth. These defenadnts further demur to the eleventh and twelfth paragraphs of the complainant's amended and supplemental bill of complaint, as amended, because (*a*) the matters and things set forth in said paragraphs are not germane to or supplementary of the original bill herein; (*b*) if the matters and things set

117 forth in said paragraphs entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action, not connected with or dependent upon the cause of action set forth in the original bill; (*c*) the matters and things set forth in said paragraphs do not entitle the complain-t to the relief prayed for, or to any relief whatsoever.

Fifth. These defendants further demur to the fourteenth, fifteenth, sixteenth, seventeenth, eighteenth and nineteenth paragraphs of the complainant's amended and supplemental bill of complaint, as amended, because (*a*) the matters and things set forth in said para-

graphs are not germane to or supplementary of the original bill herein; (*b*) if the matters and things set forth in said paragraphs entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action, not connected with or dependent upon the cause of action set forth in the original bill; (*c*) the matters and things set forth in said paragraphs do not entitle the complainant to the relief prayed for or to any relief whatever; (*d*) it appears from said paragraphs that the State Circuit Court of Kansas City, Missouri, has jurisdiction of the suit against the complainant pending therein and mentioned in said paragraphs; (*e*) the State of Missouri had a lawful right to institute said suit in said State court, and said State court had a lawful right to entertain jurisdiction of the same; (*f*) the said Attorney General had a lawful right and the authority to institute the suit referred to in said paragraphs against the complainant, in the State Circuit Court at Kansas City, Missouri, and he has the lawful right and authority to proceed with and prosecute the same to a conclusion; (*g*) if the complainant is aggrieved by the suit against it in the State Circuit Court mentioned in said paragraphs, it has an adequate remedy by making its defense (if any it have) to the same, in said State court.

Sixth. These defendants further demur to the twentieth paragraph of complainant's amended and supplemental bill of complaint, as amended, because (*a*) the matters and things set forth in
118 said paragraph are not germane to or supplementary of the original bill herein; (*b*) if the matters and things set forth in said paragraph entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action, not connected with or dependent upon the cause of action set forth in the original bill; (*c*) the matters and things set forth in said paragraph do not entitle the complainant to the relief prayed for or to any relief whatsoever; (*d*) it appears from said paragraph that the Circuit Court of Jackson County, Missouri, and the Circuit Court at St. Louis, Missouri, have jurisdiction, respectively, of the suits against the complainant and other railway companies mentioned in said paragraph; (*e*) the State of Missouri had a lawful right to institute the suits mentioned in said paragraph, and said State courts had a lawful right to entertain jurisdiction of the same; (*f*) the said Attorney General had a lawful right and the authority to institute in said State Circuit Courts the suits against the complainant and the other railway companies mentioned in said twentieth paragraph, and he has the lawful right and authority to proceed with and prosecute the same to a conclusion; (*g*) if the complainant or any of said other railway companies are aggrieved by the suits in said State Circuit Courts mentioned in said twentieth paragraph, they have an adequate remedy by making their defense (if any they have) to the same, in said State courts.

Seventh. These defendants further demur to the twenty-first paragraph of complainant's amended and supplemental bill of complaint, as amended, because (*a*) the matters and things set forth in said paragraph are not germane to or supplementary of the original bill herein; (*b*) if the matters and things set forth in said paragraph

entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action, not connected with or dependent upon the cause of action set forth in the original bill; (c) the matters and things set forth in said paragraph do not entitle the complainant to the relief prayed for or to any relief whatever.

Wherefore, and for divers other good causes of demurrer
119 appearing in complainant's amended and supplemental bill of complaint, as amended, and in the paragraphs thereof specifically mentioned in the foregoing demurrers, numbered second, third, fourth, fifth, sixth and seventh, respectively, these defendants demur thereto and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to said amended and supplemental bill of complaint as amended, or to the said paragraphs hereinbefore specifically mentioned, or any of them, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
FREDERICK W. LEHMANN,
SANFORD B. LADD,
Solicitors for Defendants.

FREDERICK W. LEHMANN,
SANFORD B. LADD,
Of Counsel.

I hereby certify that the foregoing demurrers are, in my opinion, well founded in point of law.

SANFORD B. LADD,
Of Counsel for Defendants.

The affidavit required by Equity Rule 31 is hereby expressly waived.

FRANK HAGERMAN,
Counsel for Complainant.

120 Afterwards, to-wit, on the 2nd Day of August, A. D. 1907, the demurrer of Herbert S. Hadley, Attorney General, was filed.

Said demurrer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3004.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Complainant,

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

The Demurrers of the Above-named Defendant, Herbert S. Hadley, Attorney General, to the Amended and Supplemental Bill of Complaint as Amended.

First. This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's amended and supplemental bill of complaint as amended to be true in manner and form as the same are therein and thereby set forth and alleged, doth demur thereto and for cause of demurrer showeth:

1. That the said complainant has not, in and by said amended and supplemental bill of complaint, as amended, made or stated any such cause as doth or ought to entitle it to the relief thereby sought and prayed for, from or against this defendant, or to any relief whatsoever.

2. It appears upon the face of complainant's amended and supplemental bill of complaint as amended that the complainant has an adequate remedy at law.

3. The matters and things set forth in complainant's amended and supplemental bill of complaint, as amended, are not nor are any of them germane to or supplementary of the original bill in this case.

121 4. If the matters and things set forth in complainant's amended and supplemental bill of complaint, as amended, entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action, not connected with or dependent upon the cause of action set forth in the original bill.

Second. This defendant further demurs to the fifth, sixth, seventh and eighth paragraphs of the complainant's amended and supplemental bill of complaint, as amended, because (*a*) the same are not germane to or supplementary of the original bill herein; (*b*) if the matters and things set forth in said paragraphs entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action not connected with or dependent upon the cause of action set forth in the original bill; (*c*) the matters and things set forth in said paragraphs do not entitle complainant to the relief prayed for, or to any relief whatsoever.

Third. This defendant further demurs to the ninth and tenth paragraphs of the complainant's amended and supplemental bill of complaint, as amended, because (*a*) the matters and things set forth in said paragraphs are not germane to or supplementary of the

original bill herein; (*b*) if the matters and things set forth in said paragraphs entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action not connected with or dependent upon the cause of action set forth in the original bill; (*c*) the matters and things set forth in said paragraphs do not entitle the complainant to the relief prayed for, or to any relief whatsoever.

Fourth. This defendant further demurs to the eleventh and twelfth paragraphs of the complainant's amended and supplemental bill of complaint, as amended, because (*a*) the matters and things set forth in said paragraphs are not germane to or supplementary of the original bill herein; (*b*) if the matters and things set
122 forth in said paragraphs entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action, not connected with or dependent upon the cause of action set forth in the original bill; (*c*) the matters and things set forth in said paragraphs do not entitle the complain-t to the relief prayed for, or to any relief whatsoever.

Fifth. This defendant further demurs to the fourteenth, fifteenth, sixteenth, seventeenth, eighteenth and nineteenth paragraphs of the complainant's amended and supplemental bill of complaint, as amended, because (*a*) the matters and things set forth in said paragraphs are not germane to or supplementary of the original bill herein; (*b*) if the matters and things set forth in said paragraphs entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action, not connected with or dependent upon the cause of action set forth in the original bill; (*c*) the matters and things set forth in said paragraphs do not entitle the complainant to the relief prayed for or to any relief whatever; (*d*) it appears from said paragraphs that the State Circuit Court of Kansas City, Missouri, has jurisdiction of the suit against the complainant pending therein and mentioned in said paragraphs; (*e*) the State of Missouri had a lawful right to institute said suit in said State court, and said State court had a lawful right to entertain jurisdiction of the same; (*f*) the said Attorney General had a lawful right and the authority to institute the suit referred to in said paragraphs against the complainant, in the State Circuit Court at Kansas City, Missouri, and he has the lawful right and authority to proceed with and prosecute the same to a conclusion; (*g*) if the complainant is aggrieved by the suit against it in the State Circuit Court mentioned in said paragraphs, it has an adequate remedy by making its defense (if any it have) to the same, in said State court.

Sixth. This defendant further demurs to the twentieth paragraph of complainant's amended and supplemental bill of complaint, as amended, because (*a*) the matters and things set forth in
123 said paragraph are not germane to or supplementary of the original bill herein; (*b*) if the matters and things set forth in said paragraph entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action, not connected with or dependent upon the cause of action set forth in the original bill; (*c*) the matters and things set forth in said para-

graph do not entitle the complainant to the relief prayed for or to any relief whatsoever; (*d*) it appears from said paragraph that the Circuit Court of Jackson County, Missouri, and the Circuit Court at St. Louis, Missouri, have jurisdiction, respectively, of the suits against the complainant and other railway companies mentioned in said paragraph; (*e*) the State of Missouri had a lawful right to institute the suits mentioned in said paragraph, and said State courts had a lawful right to entertain jurisdiction of the same; (*f*) the said Attorney General had a lawful right and the authority to institute in said State Circuit Courts the suits against the complainant and the other railway companies mentioned in said twentieth paragraph, and he has the lawful right and authority to proceed with and prosecute the same to a conclusion; (*g*) if the complainant or any of said other railway companies are aggrieved by the suits in said State Circuit Courts mentioned in said twentieth paragraph, they have an adequate remedy by making their defense (if any they have) to the same, in said State courts.

Seventh. This defendant further demurs to the twenty-first paragraph of complainant's amended and supplemental bill of complaint, as amended, because (*a*) the matters and things set forth in said paragraph are not germane to or supplementary of the original bill herein; (*b*) if the matters and things set forth in said paragraph entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action, not connected with or dependent upon the cause of action set forth in the original bill; (*c*) the matters and things set forth in said paragraph do not entitle the complainant to the relief prayed for or to any relief whatever.

Wherefore, and for divers other good causes of demurrer
124 appearing in complainant's amended and supplemental bill of complaint, as amended, and in the paragraphs thereof specifically mentioned in the foregoing demurrers, numbered second, third, fourth, fifth, sixth and seventh, respectively, this defendant demurs thereto and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer to said amended and supplemental bill of complaint as amended, or to the said paragraphs hereinbefore specifically mentioned, or any of them, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
FREDERICK W. LEHMANN,
SANFORD B. LADD,
Solicitors for Defendant.

FREDERICK W. LEHMANN,
SANFORD B. LADD,
Of Counsel.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

SANFORD E. LAND,
Of Counsel for Defendants.

The affidavit required by Equity Rule 31 is hereby expressly waived.

FRANK HAGERMAN,
Counsel for Complainants.

125 Afterwards, to-wit, on the 2nd day of August, A. D. 1911, the joint demurrer of Jos. M. Patterson et al. was filed. Said demurrer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3004.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

The Joint and Several Demurrer of Joseph M. Patterson, Daniel E. Moss, and George Dodd, Judges of the County Court of Jackson County, Missouri, and Arthur C. Warner, Treasurer of said County, Four of the Defendants Herein, to Complainant's Original Bill of Complaint, Its Amended and Supplemental Bill, and the Amendment to said Bill of Complaint.

These defendants, by protestation, not confessing all or any of the matters and things in complainant's original bill of complaint, its amended and supplemental bill, and the amendment to said bill of complaint to be true in such manner and form as the same are therein set forth and alleged, demur thereto, and for cause of demurrer show that the said complainant has not, in and by said original bill of complaint, its amended and supplemental bill, and the amendment to said bill of complaint, made or stated any such cause as doth or ought to entitle it to the relief thereby sought and prayed for from or against these defendants or either of them.

126 Wherefore, and for divers other good causes of demurrer appearing in said original bill of complaint, the said amended and supplemental bill, and the said amendment to the said bill of complaint, these defendants respectively demur thereto and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to the said original bill of complaint, the said amended and supplemental bill, and the amendment

to the bill of complaint, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
FREDERICK W. LEHMANN,
SANFORD B. LADD,
Solicitors for Defendants.

FREDERICK W. LEHMANN,
SANFORD B. LADD,
Of Counsel.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

SANFORD B. LADD,
Of Counsel for Defendants.

The affidavit required by Equity Rule 31 is hereby expressly waived.

FRANK HAGERMAN,
Counsel for Complainant.

12. In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3004.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

The Joint and Several Demurrer of Frank E. Craig and Robert Keith Furniture Co., Two of the Defendants Herein, to Complainant's Amended and Supplemental Bill of Complaint, as Amended.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's amended and supplemental bill of complaint, as amended, to be true in manner and form as the same are therein and thereby set forth and alleged, do demur thereto and for cause of demurrer show:

First. That the said complainant has not, in and by said amended and supplemental bill of complaint, as amended, made or stated any such cause as ought to entitle it to the relief thereby sought and prayed for from or against these defendants, or to any relief whatsoever.

Second. If the matters and things set forth in complainant's amended and supplemental bill of complaint, as amended, entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action, not connected with or de-

pendent upon the cause of action set forth in the original bill.

128 Wherefore, and for divers other good causes of demurrer appearing in complainant's amended and supplemental bill of complaint, as amended, these defendants demur thereto and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to said amended and supplemental bill of complaint, as amended, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
FREDERICK W. LEHMANN,
SANFORD B. LADD,
Solicitors for Defendants.

FREDERICK W. LEHMANN,
SANFORD B. LADD,
Of Counsel.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

SANFORD B. LADD,
Of Counsel for Defendants.

The affidavit required by Equity Rule 31 is hereby expressly waived.

FRANK HAGERMAN,
Counsel for Complainant.

129 Afterwards, to-wit, on the 2nd day of August, A. D. 1908, the joint and several demurrer of Julius H. Lang et al. was filed.

Said demurrer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3004.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

The Joint and Several Demurrer of Julius H. Lang and Charles A. Kirtley, Two of the Defendants Herein, to Complainant's Original Bill of Complaint, its Amended and Supplemental Bill and the Amendment to said Bill of Complaint.

These defendants, by protestation, not confessing all or any of the matters and things in complainant's original bill of complaint,

its amended and supplemental bill, and the amendment to said bill of complaint to be true in such manner and form as the same are therein set forth and alleged, demur thereto, and for cause of demurrer show that the said complainant has not in and by said original bill of complaint, its amended and supplemental bill, and the amendment to said bill of complaint, made or stated any such cause as doth or ought to entitle it to the relief thereby sought and prayed for from or against these defendants or either of them.

130 Wherefore, and for divers other good causes of demurrer appearing in said original bill of complaint, the said amended and supplemental bill, and the said amendment to the bill of complaint, these defendants respectively demur thereto and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to the said original bill of complaint, the said amended and supplemental bill, and the amendment to the bill of complaint, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
FREDERICK W. LEHMANN,
SANFORD B. LADD,
Solicitors for Defendants.

FREDERICK W. LEHMANN,
SANFORD B. LADD,
Of Counsel.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

SANFORD B. LADD,
Of Counsel for Defendants.

The affidavit required by Equity Rule 31 is hereby expressly waived.

FRANK HAGERMAN,
Counsel for Complainant.

131 Afterwards, to-wit, on the 24th day of September, 1907, an Interlocutory Report of Special Master was filed.

And afterwards, to-wit, on the 7th day of October, 1907, said Interlocutory Report of Special Master and the Order thereon, *was* refiled.

Said Interlocutory Report and the Order thereon is in words and figures as follows:

Circuit Court of the United States, Western Division of the Western District of Missouri.

MISSOURI PACIFIC RAILWAY COMPANY
vs.
HERBERT S. HADLEY, Attorney General, et al.

CHICAGO, BURLINGTON & QUINCY RAILWAY CO.
vs.
HERBERT S. HADLEY, Attorney General, et al.

WABASH RAILROAD COMPANY
vs.
HERBERT S. HADLEY, Attorney General, et al.

Interlocutory Report of Special Master.

To the Honorable the Judges of said Court:

By reason of the premises hereinafter recited the undersigned Special Master to whom the above entitled and fifteen other like causes were referred by order of this Court bearing date March 5th, 1906, begs leave to present this special interlocutory report.

Having completed the taking of the evidence offered by the respective parties complainants and defendants in the three cases above named, these having been duly selected out of the eighteen for hearing in the first instance in pursuance of the order of reference, the same were set down for argument before the Master on June 18th, 1907. On said date, however, the complainants in all the cases, having immediately prior thereto filed their amended and supplemental bills in this Court, further proceedings before the Master were, by consent of all parties, suspended subject to 131½ be resumed on due notice.

As appears in said amended and supplemental bills and the several amendments thereof since filed, copies of all whereof have been duly received by the Master, there have been brought into these cases various new and additional matters not embraced in the issues so referred.

And being in doubt as to whether the filing of such amended and supplemental bills do of necessity or should, pending proceedings in Court thereon, operate as a stay of further proceedings before him and of his report upon the matters and issues so referred, the Special Master therefore submits this Interlocutory Report and respectfully prays for such further orders and directions in the premises as to the Court may seem meet.

F. L. SCHOFIELD,
Special Master.

The amendments pending the hearing of the original bills of complaint had the effect, in law, of uniting the matters complained

of in one bill. They, therefore, constitute but one bill of complaint, and all matters involved should be fully heard and the Master's findings should be embraced in a single report.

(Signed) JNO. F. PHILIPS, *Judge.*

October 7th, 1907.

132 Afterwards, to-wit, on the 13th day of November, 1907, the following order was filed and entered of record, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO., Complainant,

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Also

In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

Order.

This cause coming on for hearing this November 13, 1907, it is by consent of parties ordered that leave of court be and is hereby granted to amend complainant's "Amendment to complain-t's bill of complaint," by erasing and striking out of paragraph 15 thereof the words "between 12 and 1 o'clock A. M." in lines 27 and 28 on page 2, and the words "at the said hours of" in lines 1 and 2 on page 3, and complainant's counsel are directed to forthwith make such erasure.

(Signed) SMITH McPHERSON, *Judge.*

133 Afterwards, to-wit, on the 10th day of April, 1908, the following order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3004.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Complainant,

vs.

HERBERT S. HADLEY, Attorney General, et al., Defendants.

Order.

This cause came on for hearing this 10th day of April, 1908, upon the demurrers herein filed. The parties appeared by their respective counsel, and the court, after argument, being fully advised in the premises, overrules said demurrers.

(Signed) SMITH McPHERSON, *Judge.*

134 Afterwards, to-wit, on the 12th day of May, A. D. 1908, the joint Answer of John A. Knott et al. was filed. Said answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3004.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Complainant,

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

The Joint Answer of the Defendants, John A. Knott, Frank Wightman and H. R. Oglesby, Railroad Commissioners of the State of Missouri, to the Complainant's Amended and Supplemental Bill and the Amendment Thereto.

These defendants now, and at all times hereafter, saving to themselves all and all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the many errors and imperfections in said Amended and Supplemental Bill of complaint, as amended, for answer thereto, or to so much thereof as they are advised is material or necessary to make answer to, answering say:

That they do hereby adopt as their Answer herein the answer of Herbert S. Hadley, Attorney-General of the State of Missouri, and all and singular the statements and averments thereof as fully as if the same were repeated herein, and they ask that the said Answer

be taken in all respects as the Answer of them and of each of them.

These defendants deny that the complainant is entitled to any relief whatever against these defendants, without this, that
135 any other matter, cause or thing in the complainant's amended and supplemental bill and the amendments thereto, contained, material or necessary for these defendants to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of these defendants, or any of them; to each of which matters and things these defendants are ready and willing to aver, maintain and prove, as this Honorable Court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

HERBERT S. HADLEY,
Attorney-General;
JOHN KENNISH,
Ass't Attorney-General,
Solicitors for Defendants.

SANFORD B. LADD,
F. W. LEHMANN,
Of Counsel.

Received copy of the above and foregoing Answer May 4, 1908.

BURTON HANSON,
FRANK HAGERMAN,
Solicitors for Complainant.

136 Afterwards, on the 12th day of May, A. D. 1908, the answer of Herbert S. Hadley, Attorney General, was filed. Said answer is in words & figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Answer of Herbert S. Hadley, Attorney-General of the State of Missouri, to the Complainant's Amended and Supplemental Bill and the Amendment Thereto.

This defendant now, and at all times hereafter, saving to himself all and all manner of benefit, or advantage of exception, or otherwise, that can or may be had or taken to the many errors and imperfections in said Amended and Supplemental Bill of complaint, as

amended, for answer thereto, or to so much thereof as he is advised is material or necessary to make answer to, answering says:

This defendant admits Paragraphs 1, 2, 3 and 4 of the Amended and Supplemental Bill.

This defendant denies that the Governor of the State, in giving his written reasons for approving the Act of 1905, referred to or indicated that it was with some reluctance that he signed the same.

And this defendant denies that any acknowledgment was made of the invalidity of the Act of 1905, referred to in Paragraphs 5 and 6 of the Amended and Supplemental Bill; but he admits that the Legislature of the State of Missouri did pass an act, effective June 14, 1907, in words and figures as set forth in Paragraph 6 of said Amended and Supplemental Bill.

But this defendant denies that it was the purpose or the intention of the defendant herein to attempt to enforce all penalties which may accrue if the said acts are held to be illegal.

This defendant admits that the Legislature of Missouri in 1907 passed the two acts set forth in Paragraph 7 of said Amended and Supplemental Bill.

And this defendant denies that if the complainants should charge the maximum rates prescribed by the acts of the General Assembly of the State of Missouri enacted at its session in 1907, the total gross receipts of the complainant from State traffic would be re-
137 duced in a very large sum, and denies that the said freight acts, or any of them, are violative of the provisions of the Constitution to the same extent as complainant has alleged with respect to the Act of 1905, or to any extent whatever.

And this defendant denies that the rates fixed by the Acts of 1907 are unreasonable and confiscatory, and less than the cost of the service.

And this defendant denies that the Governor of the State of Missouri in calling for the passage of said Act of 1907, and the Legislature in passing the same, did so for the avowed purpose of increasing certain of the maximum rates of the Act of 1905, which they conceived had in this litigation been proved to be unreasonable and confiscatory, and could not be enforced.

And this defendant denies that the rates as finally fixed by the Acts of 1907 were not on such a basis as would return a reasonable and fair compensation to the complainant upon the value of that portion of its property devoted to such use.

And this defendant denies that if the laws in existence in 1905, relative to passenger fares, had remained in force, the freight rates, as fixed by said Acts of 1907, would be unreasonable or confiscatory, or that they would not give a just return upon the value of that portion of complainant's property devoted to said traffic.

This defendant denies that the Legislature of the State acted without any fixed or definite knowledge upon the subject of rates, or that they erroneously conceived that if the increase in freight rates were necessary and were made, there could be a general equalization of rates by a decrease in the passenger rates, and that thereby, in substance, they could legally overcome and offset any advantage from an

increase in freight rates by decreasing the maximum rates to be charged for said passenger traffic about 33⅓ per cent, and thus while defeating pending litigation, the public, as a whole, would not be the loser.

This defendant denies that the result was that as part and parcel of one transaction and substantially as one law, and to accomplish the purposes alleged in the Amended and Supplemental Bill, there was passed, and the Governor approved, an act called the "Passenger Act," taking effect on June 14, 1907; but this defendant admits that the act relative to passenger rates, in words and figures as set forth in said Paragraph 9 of the Amended and Supplemental Bill, was enacted by the Legislature of the State of Missouri.

And this defendant denies that the said act regulating passenger rates is violative of any provision of the Constitution of the State of Missouri, or of the United States, and denies that it is subject to any of the objections made in the original bill to the Act of 1905, and denies that any of the facts alleged in the original bill as to why the Act of 1905 should be held to be void and action thereunder restrained, are true as to the Acts of 1907, or of the said passenger act.

This defendant denies that the said Passenger Act will reduce the earnings of the complainant from its passenger business in the practical and ordinary operation of the road, or otherwise, substantially one-third, or in any amount whatsoever.

The defendant has no knowledge or information or belief as to the aggregate amount of the State passenger earnings for the year 1906, and he denies that if the passenger act aforesaid had been applied thereto, State earnings would have been reduced in any sum whatever.

138 And this defendant denies that the value of that portion of complainant's property devoted to the carriage of State business, considered as a whole, or separately, as to the passenger business only, is such in any case that the reduction in rates by said Passenger Act would fail to make a reasonable return on such valuation, and denies that it would cause such business to be done at an actual loss.

This defendant denies that the said Passenger Act was passed for the avowed purpose of reducing the State passenger rates of complainant so as to off-set and overcome the supposed increase of freight rates made under the Act of 1907, and denies that the attempt was made to frame each act so as to avoid the injunctive relief in this or in each action heretofore instituted by railroad companies operating lines in Missouri.

And this defendant denies that if the injunction be not granted herein, the complainant is without means of adequate and proper relief, or would be denied due process of law. And this defendant alleges the fact to be that in the suit instituted by the State of Missouri to require by mandamus or mandatory injunction the observance of the laws of the said State, every defense, which the complainant herein and defendant in said suit may have, could be presented and considered, and the State of Missouri is contemplating no suit of any kind which would in any manner embarrass the complainant in the assertion of any rights which it may have.

This defendant says that it is not true that the special duties devolving upon the members of the Board of Railroad Commissioners and the Attorney-General, as stated in the original bill, apply to the Acts of 1907, and the Passenger Act aforesaid.

And this defendant denies that it is necessary or proper that the county judges and county treasurers of the State of Missouri should be made parties to this litigation, or that any private person should be drawn in as defendant thereto.

This defendant denies that the rates fixed by each, or any of the said Acts of 1907, or by said Passenger Act, or that the rates fixed by all of said acts, as a whole, are unreasonable or confiscatory, or that they will force an unreasonable reduction or confiscation of complainant's entire revenue, or of any part thereof, or that the said acts, or any of them, are in violation of the provisions of the Fourteenth Article of Amendment of the Constitution of the United States, or of any other provision of said Constitution.

And this defendant denies that to enforce the rates fixed by any of said acts would necessarily affect the interstate rates upon the same commodities. And this defendant alleges the fact to be that for many years past the complainant has voluntarily carried passengers in the State of Missouri, whose travel was wholly within the State, at the rate of two cents per mile. It has also carried many persons, other than employés of their own or other railroad companies, without exacting any compensation whatsoever, and the great bulk of passenger transportation within the State has been for many years past conducted at approximately two cents per mile, and that the charge of three cents exacted by complainant of any persons was an unjust, excessive and discriminatory charge upon such persons.

Referring to Subdivision (*b*) of Paragraph 11 of complainant's Amended and Supplemental Bill, this defendant says that the real purpose of the original Bill herein was to determine whether that portion of the property of complainant devoted to State
139 freight business, could, if the Act of 1905 were enforced, receive such return upon its value as would be fair, reasonable and not confiscatory, and that upon the trial of the three cases heard by the Special Master such was the theory adopted by both parties, and the proofs were by both of them directed to that end. And this defendant avers that the only legitimate and proper inquiry in this suit is as to the questions of law and fact arising upon the issues made by the original Bill and the Answer thereto, as to the validity of the said Act of 1905, and the results of its operation, and whether the same, if enforced, would be confiscatory and unremunerative to the complainant. Defendant asserts that the purpose of the original Bill ought not to be, and cannot, without disregard of the established rule of procedure of the Court of Chancery, be changed and perverted, to the end that the effect of the freight rate Act, or the passenger rate Act of 1907, shall be considered in this litigation, and that the only question proper to be considered or determined by this court in this action is the consequences to the complainant of the enforcement of the said Act of 1905.

This defendant denies that on the 11th day of June, 1907, the

complainant filed herein a written application for leave to file an Amended and Supplemental Bill, and he denies that upon the same day there was served upon the counsel for the defendants in the original Bill herein, and accepted by them, a written notice that a copy of the form of the said Amended and Supplemental Bill, reciting that application to file same and for a temporary injunction would be presented to this Court upon June 14, 1907, at the opening of said court at 10 a. m.

And he denies that two petitions in equity in the name and on behalf of the State of Missouri, referred to in Paragraph 15 of the said Amended and Supplemental Bill, as amended, were filed by him in disregard or in contempt of the jurisdiction of this Court; and he alleges the fact in that regard to be that on the thirteenth day of June, A. D. 1907, he did, in the name and on behalf of the State of Missouri, by virtue of his office and authority as Attorney-General of the said State, file two petitions of the State of Missouri, the same being petitions in equity against the complainant herein, as defendant in the said suits, the one asking that the said complainant herein, defendant in the said suit, be required to comply with the maximum freight rates provided by the laws of the State of Missouri, enacted at the legislative session of the year 1907, and the other asking that the said complainant herein, defendant in the said suit, be required to comply with the passenger rates fixed by the laws of the State of Missouri, enacted at the legislative session of the year 1907, and the said petitions were filed in the Circuit Court of the State of Missouri in and for the City of St. Louis, the same being a court of the State of Missouri of competent and general jurisdiction, and the said petitions were filed, and the suits instituted thereby, were pending, and summons, according to the laws of the State of Missouri, issued upon the said petitions and served upon the complainant herein, defendant therein, before the hour of 10 o'clock a. m. of said 14th day of June, 1907, and before any Amended or Supplemental Bill, or any amendment to the original Bill herein was filed by the complainant, or before any such amended or Supplemental Bill, or amendment to the original Bill was presented to this Court for consideration.

And this defendant alleges further that the said petition in equity so as aforesaid filed by him in the Circuit Court of the City of St. Louis, relative to the freight rates, has been dismissed by him,
140 and is no longer pending, but that the said petition in equity, so as aforesaid filed by him in the Circuit Court of the City of St. Louis, relative to the passenger rates, is still pending and undetermined.

And this defendant admits that the said Circuit Court of the City of St. Louis did on the said 13th day of June, A. D. 1907, issue its restraining order, returnable upon the — day of June, 1907, in the said suit in equity relative to the said passenger rates, requiring the complainant herein, and defendant therein, to comply with the law of the State of Missouri in that behalf.

This defendant admits that upon the 14th day of June, 1907, at 10 a. m., there *were* presented to this Court the application of complainant for leave to file its Amended and Supplemental Bill, and

for a temporary injunction, and that a continuance of the hearing of said application for one day was granted by the said court, and that this Court, upon its own motion, made the orders stated and referred to in Paragraph 16 of the said Amended and Supplemental Bill, as amended.

This defendant admits that upon June 17, 1907, this Court made and entered the order set forth in Paragraph 17 of the said Amended and Supplemental Bill, as amended.

And this defendant further admits that subpœnas have been issued, as by said order provided, and served upon this defendant.

This defendant admits that upon June —, 1907, the said Circuit Court of the City of St. Louis, upon the application of this defendant, entered an order dismissing the petition in equity of the State of Missouri theretofore filed by him relative to the freight rates prescribed by the laws of the State of Missouri, and that upon the same day, upon his application, the said court entered an order setting aside the restraining order previously issued by it in the suit in equity of the State of Missouri against this complainant, as defendant therein, relative to the passenger rates prescribed by the laws of the State of Missouri.

And this defendant avers that he made his application to set aside the said restraining order because this complainant had put into effect the passenger rates prescribed by the laws of the State of Missouri and was fully observing the same, and has continued so to do to the present time.

This defendant admits that he did not dismiss the said suit in equity, relative to the passenger rates, and has insisted that it should remain pending, and that it is his purpose to proceed therewith, if the complainant herein, defendant in the said suit, shall, at any time hereafter, cease to comply with the laws of the State of Missouri relative to passenger rates in said State.

And this defendant denies that the said State court has no jurisdiction in the premises, or that it has no right or power to compel complainant herein and defendant in the said suit, to put in force the passenger rates referred to, and he denies that any action by the said court would deny to complainant the protection accorded to it by the Fourteenth Amendment to the Constitution of the United States, and he alleges the fact in that regard to be that the said Circuit Court of the City of St. Louis is a court of competent and general jurisdiction, having jurisdiction alike of the person of the complainant herein, defendant in the suit pending in the said Circuit Court of the City of St. Louis, and that due process of law can and will be had by the complainant herein, defendant in the said suit, in the said suit, and any defense that it may have to the said suit in equity, so as aforesaid brought by the State of Mis-
141 souri in said Circuit Court of the City of St. Louis, can and will be fully and fairly heard by said Circuit Court of the City of St. Louis, and any rights which the complainant herein, defendant in the said suit, in said State court may have, will be fully conserved and protected.

This defendant denies that the facts alleged in Paragraphs 13 to 18, inclusive, of the Amended and Supplemental Bill, as amended,

are true as to each or any of the several railroad companies named in Paragraph 20 of the said Amended and Supplemental Bill, as amended, except as they correspond with the admissions and averments hereinbefore set forth in this Answer.

This defendant admits that each of said companies had filed original bills in this Court similar to the original bill filed by the complainant herein.

This defendant also admits that the suits in equity brought by the State of Missouri were brought against the several railroad companies named in said Paragraph 20 either in the Circuit Court of Jackson county, or in the Circuit Court of the City of St. Louis, as in said paragraph stated.

And this defendant admits that it is his purpose to prosecute the said suits in equity, so brought by the State of Missouri in its said courts, in relation to the passenger rates, in the event that the said companies, defendants in said suits, shall fail to continue in observance of the passenger rates prescribed by the laws of the State of Missouri.

And this defendant denies that as to any of the complainants in the suits pending in the Circuit Court of the United States, defendants to the suits brought by the State of Missouri, restraining orders from the said State courts were served in the court room of this Court while the said parties, or any of them, were presenting applications to this Court upon June 14, 1907, but, on the contrary, this defendant alleges the fact to be in that regard that the said restraining orders were all served upon the proper officers of the said companies at their respective offices.

And this defendant denies that the said passenger Act of 1907, and that each or any of the freight acts of the State of Missouri of 1907, is void and of no effect, for the reason that it is an attempt to deprive complainant of its property without due process of law, or denies the complainant the equal protection of the law, and he alleges the fact in that regard to be that the said passenger act of 1907 is a reasonable and proper regulation of passenger rates in the State of Missouri, and that each of said freight acts of 1907 is a reasonable and proper regulation of rates for the transportation of freight; and that the said rates so prescribed by the said several acts of the General Assembly of the State of Missouri, and each of them, prescribe fair, proper and remunerative rates for the service to which the said acts severally relate.

And this defendant denies that the penalties provided by the said acts for a violation of them are harsh and unreasonable, or that they could in anywise be made burdensome, except through a persistent and continued disregard of the law by the said complainant.

This defendant denies that the said acts, or any of them, influence, affect or bear upon interstate freight and passenger traffic, or that they, or any of them, fix and regulate interstate freight and passenger traffic.

As to whether the Kansas City, Clinton & Springfield Railway Company, and the St. Louis & San Francisco Railroad Company, between Kansas City and Springfield, are of substantially the same

length, or as to whether the line of the [illegible]
142 points extending into and out of Kansas, or whether the
carriage between said points is interstate, or [illegible]
other company has one line which in its course runs into and out of
a portion of Kansas, and another separate line between said points
which extends wholly through Missouri, or whether the carriage be-
tween said points upon one line is interstate and upon the other
state; or whether between Joplin and Kansas City there are four
trunk lines of substantially the same length, some of which are
within the State, and some of which are without the State, or whether
all of the traffic on some of said lines between Joplin and Kansas
City is State, and on other of said lines, between said points is inter-
state; or whether between St. Louis and St. Joseph, Missouri, the
line of the Chicago, Burlington & Quincy Railroad Company does
not pass out of the State, or whether the traffic on said line between
said points on said line is wholly State; or whether the line of the
Missouri Pacific Railway Company between said St. Louis and St.
Joseph in its course passes into and out of the state of Kansas, or
whether the entire traffic upon said railway between said points is
interstate; or whether between Kansas City and St. Joseph, Missouri,
there are four trunk lines of substantially equal length, some of
which are wholly within Missouri, and upon some of which the
traffic between said points is State, or whether the lines of some of
them pass into and out of Kansas, or the entire traffic upon them
between said points, is wholly interstate, this defendant has no
knowledge, information or belief.

This defendant admits that some of the large and populous com-
munities of the State are upon its eastern and western borders. It
admits that the main course of part of the traffic through the State
is east and west. He has no knowledge, information or belief as to
whether any of the railroads in the State either operate lines extend-
ing into other states, or into the state of Kansas or Illinois, or whether
any of them have joint freight and passenger traffic arrangements
with lines running into those states, or interstate carriage of freight
and passengers.

As to whether the interstate passenger rates are higher than those
fixed by the passenger act of 1907, or whether passengers starting
from points in Missouri to go to other states buy tickets as far as
a mile to the last station in Missouri upon its border, and there buy
tickets or pay fare from thence to their interstate destination, and
vice versa, this defendant has no knowledge, information or belief.

As to what the interstate rate from St. Louis to Topeka, Kansas,
or has been, this defendant has no knowledge, information or belief,
or as to whether a passenger starting from St. Louis or Kansas City
his tickets in the manner stated in the Amended and Supplemental
Bill, as amended.

He denies that the lowering of the State rate for the transporta-
tion of passengers necessarily affects, fixes or lowers the interstate pas-
senger rate, and he denies that the same is true of the freight traffic.

This defendant denies that the complainant is entitled to any relief
whatever against this defendant, without this, that any other matter,
cause or thing in the complainant's Amended and Supplemental Bill

and the amendments thereto, contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
Assistant Attorney General,
Solicitors for Defendant.

SANFORD B. LADD,
F. W. LEHMANN,
Of Counsel.

Received copy of the above and foregoing Answer May 4, 1908.
BURTON HANSON,
FRANK HAGERMAN,
Solicitors for Complainant.

Afterwards, to-wit, on the 1st day of June, A. D. 1908, a replication was filed. Said replication is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3004.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Replication of Complainant to the Joint Answer of John A. Knott, Frank Wightman and H. R. Oglesby, Railroad Commissioners of the State of Missouri, to the Complainant's Amended and Supplemental Bill and the Amendment Thereto.

This replicant saving and reserving to itself all and all manner of advantage of exception which may be had or taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendants for replication thereunto, saith: That it does and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants, is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that, that

any other matter or thing in the said answer contained, material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

FRANK HAGERMAN,
Solicitors for Complainant.

GEO. R. PECK,
BURTON HANSON,
Of Counsel.

145 Afterwards, to-wit, on the 1st day of June, A. D. 1908, a replication was filed. Said replication is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Replication of Complainant to the Answer of Herbert S. Hadley, Attorney General of the State of Missouri, to the Complainant's Amended and Supplemental Bill and the Amendment Thereto.

This replicant saving and reserving to itself all and all manner of advantage of exception which may be had or taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendant for replication thereunto, saith: That it does and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant, is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

FRANK HAGERMAN,
Solicitors for Complainant.

GEO. R. PECK,
BURTON HANSON,
Of Counsel.

146 Afterwards, to-wit, on the 13th day of June, 1908, the following order was filed and entered of record, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General, et al., Defendants.

And also

In Equity.

RAILROAD COMPANIES
vs.
HERBERT S. HADLEY, Attorney General, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

Order.

Causes numbered 2988, 2989, 2990, 2991, 2995, 2997, 3001, 3002, 3003, and 3006 came on for hearing this June 13, 1908, upon the application of complainants to at once set down for hearing their applications for temporary injunctions. The parties appeared by counsel, the defendants insisting that such hearing be postponed for a period of ninety days, and the court being fully advised in the premises Orders,

1. The Special Master shall file herein so much of the testimony as has been taken in any of the 18 cases.

2. Orders on the applications to set down for hearing at once the motions for temporary injunctions are deferred for the present, and in lieu thereof by consent of counsel all of the 18 cases are set for final hearing the 5th day of October, 1908, or as soon thereafter as the court can hear the same upon such evidence as has been heretofore taken and such further oral and documentary evidence as then may be offered under the 67th rule in equity as amended.

(Signed) SMITH McPHERSON, *Judge.*

147 Afterwards, to-wit, on the 13th day of June, 1908, an Affidavit was filed. Said affidavit is in words and figures as follows:

STATE OF MISSOURI,
City of St. Louis, ss:

T. F. Wharton, being first duly sworn, says that he is Manager of the Saint Louis Office of Haskins & Sells, Certified Public Ac-

countants, and has been for the past three years; that the firm of Haskins & Sells has been employed by the State of Missouri for the past two years as expert accountants in connection with the Maximum Freight Rate Litigation and the Passenger Rate Litigation; and that as Manager of the Saint Louis Office, this affiant has been connected with all of said work and is familiar therewith and with the length of time required for such work; that he was asked by the Attorney General on the 9th day of June, 1908, to come to Jefferson City for the purpose of making an examination of statements filed on that date by the following named railroads:

Missouri Pacific Railway Company,
Missouri, Kansas & Texas Railway System,
Chicago, Great Western Railway Company,
Chicago, Rock Island & Pacific Railway Company,
St. Louis & San Francisco Railroad Company,
St. Louis Southwestern Railway Company,
Chicago & Alton Railroad Company,
St. Joseph & Grand Island Railway Company,
Kansas City, Clinton & Springfield Railway Company,
Atchison, Topeka & Santa Fe Railway Company,

such examination to be made in order to determine the length of time necessary for the verification of the reports submitted by the aforesaid railroad companies and for the preparation of reports in relation thereto; that on the 10th day of June, 1908, this affiant went to Jefferson City for the purpose indicated; that he then received from Attorney General Hadley the statements re-
148 ferred to, and more particularly described in Exhibits "A" to "J" hereto attached and made a part of this affidavit; Further, that in order to properly pass upon the reports referred to, it will be necessary, First, to verify the clerical accuracy of the figures themselves; Second, to verify the correctness of the comparisons made where there have been such comparisons; and where no comparisons have been made, it will be necessary to prepare, or have prepared, proper comparative statements; Third, to verify the correctness of the division of expenses between freight and passenger business and between state and Inter-State business; and Fourth, it will be necessary to compare the method used in dividing expenses with the method by which such expenses were divided by the Missouri Pacific, Burlington and Wabash Railroads, in the testimony already heard, in the Maximum Freight Rate cases. In addition to this, it will be necessary to secure information in other states, where there has been no change in Passenger Rates during the past two years, as to the effect on Passenger earnings of the business depression, which began about the middle of October, 1907. It will also be necessary to secure from other states where the two cent passenger law has been in effect for some time, information showing the effect of the operation of the law on the earnings of the railroad companies.

In view of the amount of work above outlined that it will be necessary to do in connection with the statements hereinbefore referred to, this affiant believes that it will require the services of four or five

experienced accountants for about three months to make the necessary verifications, prepare the necessary statistics, and place in proper form all such matter for the information of the Court.

T. F. WHARTON.

Subscribed and sworn to Before me this 11th day of June, 1908. Commission expires Jany. 14, 1911.

[SEAL.]

FRANK WELLER,
Notary Public.

City of St. Louis, Mo.

NOTE.—In the attached exhibits, the word "State" is used to indicate "Intra-State" business.

149

EXHIBIT "A."

Missouri Pacific Railway Company.

Statements Showing Passenger Earnings by Months for the Six Months Ended December 31, 1907 *and* 1906, *Divided Between State and Inter-State, with Expenses for the Periods Named; also Reports Showing Freight Earnings and Expenses for the Same Periods.*

Method of dividing expenses and charges between freight and passenger, and State and Interstate business is not shown.

Summary of Intra-State Passenger Business Only, as Shown by Statements, for the Six Months Ended December 31.

	1907.	1906.	Increase.
July to October.....	$580,056.65	$564,593.97	$15,462.68
November and December	218,420.34	245,212.35	26,792.01*
Total.....	$798,476.99	$809,806.32	$11,329.33*
Operating Expenses..	728,676.35	664,730.09	63,946.26
Net Earnings	$69,800.64	$145,076.23	$75,275.59*
Charges, not Including Interest	23,980.87	8,582.45*	32,453.32
Available for Interest and Dividends.	$45,929.77	$153,658.68	$107,728.91*

*Decrease. [In red ink in copy.]

150 EXHIBIT "B."

Missouri, Kansas & Texas Railway System.

Various Monthly Statements of Passenger and Freight Earnings and Expenses for the Period from June 19 to December 31, 1907, with Statements by Months for the Period from June 19 to September 18, 1907 and 1906.

State and Inter-state business is not separated in reports.

Method of dividing expenses between freight and passenger business is not shown.

Summary of Passenger Earnings, Expenses and Charges, as Shown by Statements, for the Periods from June 19 to September 18.

	1907.	1906.	Increase.
Revenue	$365,573.83	$318,861.06	$46,712.77
Operating Expenses	235,619.96	225,148.53	10,471.43
Net Earnings	$129,953.87	$93,712.53	$36,241.34
Taxes and Rentals	25,381.17	27,261.31	1,880.14*
Available for Interest and Dividends	$104,572.70	$66,451.22	$38,121.48

* Decrease. [In red ink in copy.]

151 EXHIBIT "C."

Chicago Great Western Railway Company.

Statements (Supposed to be Filed by this Company) Showing Passenger Earnings Only, by Months, for the Periods from June 19 to September 18, 1907 and 1906, and also for the Three Months Ended September 30, 1907 and 1906, Divided between State and Inter-State.

No expenses are given.

Summary of Passenger Earnings, as Shown by Statements, for the Periods from June 19 to September 18.

	1907.	1906.	Decrease.
Intra-State	$12,568.23	$14,604.75	$2,036.52
Missouri to Other States	19,423.07	21,753.31	2,330.24
Other States to Missouri	20,297.69	18,783.71	1,513.98*
Other States through Missouri	1,225.86	1,047.64	178.22*
Between Points in Missouri Through Kansas	4,181.53	4,292.36	110.83
Total	$57,696.38	$60,481.77	$2,785.39

* Increase. [In red ink in copy.]

152 EXHIBIT "D."

Chicago, Rock Island & Pacific Railway Company.

Statement (Tentative Figures Only) for Period from June 19 (6 a. m.) to and Including September 18, 1907 and 1906, of Passenger and Freight Earnings, Expenses, and Taxes.

Business is not divided between State and Inter-state.
Method of dividing expenses is not given.

Summary of Passenger Earnings, Expenses, and Taxes, as Shown by Statement, for the Period Mentioned Above.

	1907.	1906.	Increase.
Revenue	$271,240.36	$246,701.04	$24,539.32
Operating Expenses:			
Maintenance of Way and Structures	$113,162.23	$85,857.89	$27,304.34
Maintenance of Equipment	48,251.58	37,947.48	10,304.10
Other Expenses	162,531.00	163,760.05	1,229.05*
Total	$323,944.81	$287,565.42	$36,379.39
Deficit from Operations	$52,704.45	$40,864.38	$11,840.07
Taxes	5,411.14	3,946.88	1,464.26
Deficit before deducting Interest, etc.	$58,115.59	$44,811.26	$13,304.33

* Decrease. [In red ink in copy.]

153 EXHIBIT "E."

St. Louis & San Francisco Railroad Company.

Statements by Months and in Total for the Three Months Ended September 30, 1907, of State and Inter-State Passenger and Freight Earnings, Expenses, and Charges.

Method of dividing expenses and charges between Freight and Passenger business is not shown: Expenses and Charges, and Miscellaneous earnings are divided between State and Inter-State business on the basis of the actual earnings of each class of business.

No comparisons are made with the same periods of the previous year, under three-cent law.

Summary of Intra-State Passenger Business, as Shown by Statements, for the Three Months Ended September 30, 1907.

Revenue	$718,992.65
Operating Expenses	599,298.01
Net Earnings	$119,694.64
Taxes and Rentals	24,104.07
Available for Interest and Dividends	$95,590.57

154 EXHIBIT "F."

St. Louis Southwestern Railway Company.

Statement for Six Months Ended December 31, 1907, *of State and Inter-State Passenger and Freight Earnings, Expenses, and Charges, with Memorandum of Bases Used in Dividing Revenues, Expenses, and Charges Between Freight and Passenger and State and Inter-State Business.*

Expenses are divided between Freight and Passenger business generally on basis of revenue train-miles. Expenses are divided between State and Inter-State business on basis of number of passengers one mile. Taxes are divided on basis of freight and passenger revenue of each class.

No comparisons are made with same period of previous year, under three-cent law.

Summary of Intra-State Passenger Earnings and Expenses, as Shown by Statement, for the Six Months Ended December 31, 1907.

Revenue	$29,625.21
Operating Expenses	31,407.27
Loss from Operation	$1,782.06
Taxes and Sundry Charges (Less Other Income)	1,224.67
Total Loss, before deducting Interest	$3,006.73

NOTE.—During the same period, the Inter-State business shows a profit, before deducting interest, of $12,589.49.

155 EXHIBIT "G."

Chicago & Alton Railroad Company.

Statements for the Month of September, 1907, and the Three Months Ended September 30, 1907, and for the Month of October, 1907, and the Four Months Ended October 31, 1907, of Passenger Earnings, Expenses, and Fixed Charges Divided Between State and Interstate Business.

Method of apportioning expenses and charges to Passenger business are not shown. The method of dividing expenses between state and Inter-State business is not shown; but it is evidently on basis of passenger miles; charges divided between State and Inter-State Passenger business on basis of passenger miles.

No comparisons are made with same periods of previous year, under three-cent law.

Summary of Intra-State Passenger Earnings and Expenses, as Shown by Statements, for Four Months Ended October 31, 1907.

Revenue	$193,822.87
Operating Expenses	116,267.44
Available for Interest and Charges	$77,555.43
Amount of Interest and Charges	62,283.85*
Surplus for the period	$15,271.58

*Amount of Interest alone not given.

156 EXHIBIT "H."

St. Joseph & Grand Island Railway Company.

Statement of Passengers Carried and Revenue Received, by Months, for the Six Months Ended December 31, 1907 and 1906, Divided Between State and Interstate.

No expenses are given.

Summary of Passenger Earnings, as Shown by Statement, for the Six Months Ended December 31.

	1907.	1906.	Increase.
Intra-State	$20,101.43	$25,115.93	$5,014.50
Inter-State	9,718.42	11,384.51	1,666.09
Total	$29,819.85	$36,500.44	$6,680.59

157 EXHIBIT "I."

Kansas City, Clinton & Springfield Railway Company.

Statements of Passengers Carried and Revenue Received, by Months, with Expenses Charged to Passenger Traffic, for the Period from June 19 to November 30, 1907 and 1906.

Expenses are not divided between State and Inter-state business. The method of apportioning expenses to Passenger business is not given.

Summary of Passenger Earnings and Expenses, as Shown by Statements, for the Periods Shown Above.

Earnings.	1907.	1906.	Increase.
Intra-State	$24,319.00	$26,159.57	$1,840.57*
Inter-State	22,171.38	22,043.20	128.18
Total	$46,490.38	$48,202.77	$1,712.39*
Operating Expenses	92,633.11	92,378.03	255.08
Deficit from Operations..	$46,142.73	$44,175.26	$1,967.47

*Decrease. [In red ink in copy.]

158 EXHIBIT "J."

Atchison, Topeka & Santa Fe Railway Company.

Statements for the Months of July, August, and September, 1907 and 1906, Showing Passenger and Freight Business, with Expenses of Each, and Statements for the Three Months Ended September 30, 1907 and 1906, Showing Passenger and Freight Earnings, Expenses, and Charges Divided Between State and Inter-State Business.

Method of dividing expenses and charges between freight and passenger business is not shown. Expenses are divided between State and Inter-State business on basis of earnings of each class of business.

Summary of Intra-State Passenger Business, as Shown by Statements, for the Three Months Ended September 30.

	1907.	1906.	Increase.
Revenue from Passengers.	$56,329.47	$50,959.63	$5,369.84
Excess Baggage, Mail, Express, Etc.	24,531.16	24,162.71	368.45
Total	$80,860.63	$75,122.34	$5,738.29

Operating Expenses:			
Maintenance of Way and Structures	$31,779.37	$28,871.00	$2,908.37
Maintenance of Equipment	9,984.00	7,375.10	2,608.90
Other Expenses	28,706.04	27,955.42	750.62
Total	$70,469.41	$64,201.52	$6,267.89
Net Earnings	$10,391.22	$10,920.82	$529.60*†
Taxes and Rentals	1,647.99	1,624.68	23.31
Available for Interest and Dividends	$8,743.23	$9,296.14	$552.91*†

[*In red ink in copy.]
†Decrease.

159 Afterwards, to-wit, on the 13th day of June, 1908, a Notice was filed. Said notice is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General, et al., Defendants.

And also

In Equity.

RAILROAD COMPANIES
v.
HERBERT S. HADLEY, Attorney General, et al., Being Cases Numbered 2989, 2990, 2991, 2995, 2997, 3001, 3002, 3003 and 3006.

Notice.

Complainants in above numbered cases will, upon June 13th, 1908, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, make application to the court to set down for hearing the applications for temporary injunctions therein pending.

FRANK HAGERMAN,
Solicitor for Complainants.

Received copy of above notice this June 8th, 1908.
HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
SANFORD B. LADD,
F. W. LEHMANN,
Solicitors.

160 Afterwards, to-wit, on the 21st day of September, 1908, the Master's Return to order of June 13, 1908, was filed. Said Master's Return is in words and figures as follows, to-wit:

Circuit Court of the United States, Western Division of the Western District of Missouri.

No. 2988.

St. Louis & San Francisco Railroad Company
vs.
Herbert S. Hadley, Attorney General, et al.

Also

Railroad Companies
vs.
Herbert S. Hadley, Attorney General, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004 and 3006.

Master's Return to Order of June 13, 1908, *with All Testimony Taken.*

To the Honorable the Judges of said Court:

In obedience to the order entered in the above mentioned cases, bearing date of June 13, 1908, the undersigned Special Master herewith returns all the testimony taken before him in the three cases in which testimony was taken, viz., the cases of the Missouri Pacific Railway Company, The Chicago, Burlington & Quincy Railway Company, and the Wabash Railroad Company, together with all the exhibits referred to in said testimony, and being all the testimony taken in any of the said eighteen cases.

Respectfully submitted,

F. L. SCOFIELD,
Special Master.

Hannibal, Mo., September 18th, 1908.

161 Afterwards, to-wit, on the 5th day of October, 1908, the following order was filed and entered of record, to wit:

In the Circuit Court of the United States, Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General, et al., Defendants.

And also

RAILROAD COMPANIES
against
HERBERT S. HADLEY, Attorney General, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3006, all in Equity in said Court.

Orders.

These cases come on for further hearing this October 5th, 1908, pursuant to the orders in all said cases made June 13th, 1908.

And the Court orders that each, all and every of said eighteen (18) cases be and the same are hereby continued until November ninth (9th) A. D. 1908, at ten o'clock A. M., at which time all of said cases will be called for trial, and the trials will then proceed from day to day until concluded. And said cases will be heard and decrees rendered on the evidence heretofore taken before the Special Master, and on such oral testimony and documentary evidence as may be offered by any of the parties to said cases pursuant to General Equity Rules 67 as amended. The evidence taken in any one of said cases shall be used in each, all and every of the other seventeen (17) cases in so far as the same will be pertinent or germane.

162 Said cases will be called and heard in the numerical order given said cases by the clerk; that is to say, the case with the lowest numerical number to be first heard, and the next lowest number next heard, and so on until all said cases are heard.

All agreements between any of the parties in any of said cases, whether such agreements are recited in orders of this court or by the Special Master, or whether such agreements are otherwise in writing, or verbally made, are hereby cancelled and will not be regarded by the Court, and future agreements, if any, will only be considered by the Court when reduced to writing and signed by the parties and filed with the clerk in said case or cases.

However, the orders, made in said cases June 13th, 1908, and the agreements therein recited are fully ratified and confirmed except only as to the change of date for hearing from October 5th, 1908, to November 9th, 1908.

And the applications for temporary injunction are continued until November 9th, 1908, or until such later time as said applica-

tions may be presented, and the court may be able to hear the same.
Done in open court this October 5th, 1908.

(Signed) SMITH McPHERSON, *Judge.*

Afterwards, to-wit, on the 14th day of December, 1908, the following order was filed and entered of record, to-wit:

UNITED STATES OF AMERICA, *set:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.
VS.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

163 In Equity.

RAILROAD COMPANIES
VS.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

MONDAY, *November* 9, *A. D.* 1908.

This day come the parties by their solicitors, the complainant by W. F. Evans, Esq., and Frank Hagerman, Esq., and the defendants by the Honorable Herbert S. Hadley, F. H. Lehmann, Esq., and Sanford B. Ladd, Esq. Thereupon this cause coming on regularly for final hearing, evidence on the part of complainant is begun and the same not being concluded at the hour of adjournment, further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

Afterwards, to-wit, on the 14th day of December, 1908, the following order was filed and entered of record, to-wit:—

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.
In Equity. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004 and 3006.

TUESDAY, *November* 10, 1908.

Now on this day again come the parties by their solicitors. Thereupon the hearing of evidence on the part of complainant is proceeded with and the same not being concluded at the hour of
164 adjournment, further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

Afterwards, towit, on the 14th day of December, 1908, the following order was filed and entered of record, to-wit:

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

WEDNESDAY, *November* 11, 1908.

Now on this day again come the parties by their solicitors. Thereupon the hearing of evidence on the part of complainant is proceeded

with and the same not being concluded at the hour of adjournment, further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

165 Afterwards, to-wit, on the 14th day of December, 1908, the following order was filed and entered of record, to-wit:—

UNITED STATES OF AMERICA, *set:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

THURSDAY, *November* 12, 1908.

Now on this day again come the parties by their solicitors. Thereupon the hearing of evidence on the part of complainant is proceeded with and the same not being concluded at the hour of adjournment, further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

Afterwards, to-wit, on the 14th day of December, 1908, the following order was filed and entered of record, to-wit:

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

166 vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

FRIDAY, *November* 13, 1908.

Now on this day again come the parties by their solicitors. Thereupon the hearing of evidence on the part of complainant is proceeded with and the same not being concluded at the hour of adjournment, further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

Afterwards, to-wit, on the 14th day of December, 1908, the following order was filed and entered of record:

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

SATURDAY, *November* 14, 1908.

Now on this day again come the parties by their solicitors.

167 Thereupon the hearing of evidence on the part of complainant is proceeded with and the same not being concluded at

the hour of adjournment, further proceedings are postponed until Monday, December 14th.

(Signed) SMITH McPHERSON, *Judge.*

Afterwards, to-wit, on the 15th day of December, 1908, the following order was filed and entered of record, to-wit:

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

Now on this day again come the parties by their solicitors. Thereupon the hearing of evidence on the part of complainant is proceeded with and the same not being concluded at the hour of adjournment, further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

Monday, December 14, 1908.

Afterwards, to-wit, on the 16th day of December, 1908, the following order was filed and entered of record:

168 UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2889, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

Now on this day again come the parties by their solicitors. Thereupon the hearing of evidence on the part of complainant is proceeded with and the same not being concluded at the hour of adjournment, further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

Tuesday, December 15, 1908.

Afterwards, to-wit, on the 17th day of December, 1908, the following order was filed and entered of record, to-wit:

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

169 In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

Now on this day again come the parties by their solicitors. Thereupon the hearing of evidence on the part of complainant is pro-

ceeded with and the same not being concluded at the hour of adjournment, further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

Wednesday, December 16, 1908.

Afterwards, to-wit, on the 18th day of December, 1908, the following order was filed and entered of record, to-wit:—

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES

v.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

Now on this day again come the parties by their solicitors. Thereupon the hearing of evidence on the part of complainant is proceeded with and the same not being concluded at the hour of adjournment, further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

Thursday, December 17, 1908.

170 Afterwards, to-wit, on the 19th day of December, 1908, the following order was filed and entered of record, to-wit:—

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

Now on this day again come the parties by their solicitors. Thereupon the hearing of evidence on the part of complainant is proceeded with and the same not being concluded at the hour of adjournment, further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

Friday, December 18, 1908.

Afterwards, to-wit, on the 21st day of December, 1908, the following order was filed and entered of record, to-wit:

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

171

Also

In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

This day again come the parties by their attorneys. Thereupon evidence on the part of the complainant, St. Louis & San Francisco

Railroad Co., is concluded and further proceedings are postponed until next Tuesday morning at nine o'clock.

(Signed) SMITH McPHERSON, *Judge.*

Saturday, December 19, 1908.

Afterwards, to-wit, on the 22nd day of December, 1908, the following order was filed and entered of record, to-wit:—

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004 and 3006.

Now on this day again come the parties by their solicitors. Thereupon the hearing of evidence on the part of defendants is begun and the same not being concluded at the hour of adjournment, further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

Tuesday, December 22, 1908.

172 Afterwards, to-wit, on the 23rd day of December, 1908, the following order was filed and entered of record, to-wit:—

UNITED STATES OF AMERICA, *ect:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

This day again come the parties by their attorneys. Thereupon further evidence upon the part of the defendants is heard and the same not being concluded at the hour of adjournment further proceedings are postponed until Monday, December 28, 1908, at nine o'clock.

(Signed) SMITH McPHERSON, *Judge.*

Wednesday, December 23, 1908.

Afterwards, to-wit, on the 28th day of December, 1908, the following order was filed and entered of record, to-wit:

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

173 Also

In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

This day again come the parties by their solicitors. Thereupon the hearing of evidence is proceeded with and further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

December 28, 1908.

Afterwards, to-wit, on the 29th day of December, 1908, the following order was filed and entered of record, to-wit:—

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

This day again come the parties by their solicitors. Thereupon

the hearing of evidence is proceeded with and further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

December 29, 1908.

174 Afterwards, to-wit, on the 29th day of December, 1908, a stipulation was filed. Said stipulation is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Complainant,
vs.
HERBERT S. HADLEY, Attorney General, et al., Defendants.

Stipulation.

It is hereby stipulated that this case may abide the orders, judgments and decrees entered in case No. 2989, Atchison, Topeka & Santa Fe Ry. Co. vs. Herbert S. Hadley, et al.

WM. ELLIS,
FRANK HAGERMAN,
Solicitors for Complainant.
HERBERT S. HADLEY,
JOHN KENNISH,
Solicitors for Defendants.

175 Afterwards, to-wit, on the 29th day of December, 1908, the following order was filed and entered of record:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Complainant,
vs.
HERBERT S. HADLEY, Attorney General, et al., Defendants.

Now on this day in accordance with the stipulation of parties filed herein, it is ordered that this case may abide the orders, judgments and decrees entered in case No. 2989, Atchison, Topeka & Santa Fe Railway Co. vs. Herbert S. Hadley, et al.

(Signed) SMITH McPHERSON, *Judge.*

Dec. 29, 1908.

176 Afterwards, to-wit, on the 30th day of December, 1909, Complainants' Requests for Findings of Fact *was* filed. Said Requests are in words and figures as follows, to-wit:

Complainants' Requests for Findings of Fact.

1. The complainants are the eighteen railroad corporations owning and operating lines of railway in Missouri, engaged generally in doing therein with the same property, the entire state and interstate railroad business. With the exception hereinafter stated as to the St. Louis & Hannibal and the Kansas City, Clinton & Springfield, they constitute great trunk lines of railroads, carrying in and through Missouri the commerce of the country, state and interstate, reaching and connecting various commercial centers like Chicago, St. Louis, Kansas City, Omaha, Denver, St. Paul, Memphis, New Orleans, and Galveston. Some of them, like the Atchison, Topeka & Santa Fe and the Chicago, Rock Island & Pacific operate through trans-state trains, running from Chicago to the Pacific Ocean. All operate, in connection with other roads at connecting points and large centers so as to carry all the traffic of the state, freight and passenger, not only that which is state but also that which is interstate, and that which is destined to and from other roads and other states. The interstate business may originate or terminate in the state, or in some instances both there originate and terminate or it may pass through the state with origin and destination both outside thereof. The St. Louis & Hannibal Railway is located wholly within the state, extending from Hannibal, Missouri, through a valuable and populous part of the state, to a point upon the Wabash Railway and is the only one of the complainants, the line of which does not cross the state line. The Kansas City, Clinton & Springfield Railway extends from Olathe, Kansas, (a small town about 20 miles from Kansas City, Missouri,) for a distance of about eleven miles to the state line from
177 whence it runs through the southwestern part of the state but not as in the case with the other railways reaching with its own trains any of the basing points or great commercial or market centers of the state.

2. The same properties, trains and facilities are necessarily used by each company, in conducting both the state and interstate business. It would not be practicable to operate in any other way. If separate cars or trains were required to be operated for the state and interstate business or separate facilities used for each, no one of the complainants could for the business of any or all classes in this state pay operating expenses, the public would be greatly inconvenienced, and enormous investments would be required in order to meet changed conditions. It is absolutely essential to the safety, convenience and economy of passengers and shippers for the business to be conducted as it is, without any attempted separation in conducting upon the same trains and with the same facilities both the state and interstate business.

3. Missouri is peculiarly located so far as concerns the question whether the fixing a state rate directly affects an interstate rate.

The state is midway between the Great Lakes and the Gulf of Mexico, and midway between the Atlantic and Pacific Oceans. The vast quantities of traffic, and volumes of travel between the east and west and north and south necessarily cross the entire state. Two great rivers bound the state upon the east and west. Upon these rivers are located great markets and commercial centers. Those at Kansas City being the largest between the Mississippi River and the Rocky Mountains. All freight rates from the east to the west and vice versa are made up of a rate to and from these rivers plus the rate across the state. This has always been so and whatever the reason therefor, as a practical railway problem will always be so if intelligent, experienced and practical railway men are permitted to fix rates upon a fair, reasonable and intelligent basis. The river points, therefore, have become and are rate basing centers. Great cities and markets have been built up by reason of and upon the faith of this fact.

178 At such points great railroad properties have been acquired and extensive terminals provided in view thereof. In many instances the railways there terminate. If a different method were adopted a chaotic condition would be created, business of these cities and markets would be seriously and unduly disturbed and embar-assed and investments there made largely affected. The actual result is that the short line mileage across the state actually controls and fixes the freight rate by every other railway, no matter what the distance or points of origin and destination may be. From Hannibal to St. Joseph, Missouri, is 198 miles by the Chicago, Burlington & Quincy Railway. This is the shortest rail distance between the rivers. From St. Louis to St. Joseph it is at least 300 miles, to Kansas City 280 and upward. Whenever a freight rate per mile is fixed for the 198 miles, the short route between the rivers, the total rate between all Mississippi and Missouri River points must conform thereto, even though the distance be 300 or more miles. This situation applies to every competitive point between the rivers of which there are many of magnitude and importance. The traffic between St. Louis and Missouri river points, both state and interstate, is enormous. Every railway carrying freight must be at the expense of carrying it from 280 to 300 or more miles, yet receive therefor a rate based upon a distance of 198 miles. Unless it should do so it would not be able to handle enough freight between river points to justify the running of trains. Unless the rates were so fixed no substantial business would be done between the river points because every shipper to or from the east would be compelled to ship by the short line. St. Louis merchants could not compete for western business. In the passenger traffic the universal rule is that the short line between any two stations fixes and establishes the rate. In other words, the rate being fixed per mile, the longer route will not be able to carry passengers between any two points if its total rate exceeds the short line rate. In actual railway operation the state line is wholly arbitrary.

179 Unless the mileage rates is the same, passengers will, if the state rate be lower than the interstate, buy tickets or pay fare to a state line station and there provide themselves anew with tickets thus making an interstate journey partly state. Experience

has demonstrated this to be noticeably true. In July and August, 1907, when a two cent fare was in force in Missouri upon state business and three cents upon interstate this practice became quite general. It became absolutely necessary as a practical railroad question to put in force the same rate for state and interstate travel; otherwise it would have become impossible to keep track of a large part of the interstate travel and a large unnecessary expense been incurred by the work imposed at the state line stations. For these and many other reasons shown by the evidence, including those mentioned in paragraph 4, it is a fact that no mileage state rate, for freight or passengers, extending across the state of Missouri, can be established which does not actually and immediately directly affect the interstate rate, not only in but out of the state. It therefore, must as a fact, be said that the rates fixed by the laws complained of in the bills, do directly and immediately affect and regulate interstate commerce.

4. Two of the great trunk lines in Missouri are the Missouri Pacific and the Chicago, Burlington & Quincy Railways. Both extend from St. Louis to St. Joseph,—the Burlington lines between these points are wholly within the state; those of the Missouri Pacific pass out of Missouri at Kansas City, into Kansas, leaving that state at Atchison, coming again into Missouri. All traffic over the Missouri Pacific from St. Louis to St. Joseph is interstate. If the state rate, freight or passenger, be lawfully fixed the Burlington must conform thereto on its St. Louis and St. Joseph business. When it so does this rate must be met by the Missouri Pacific or else the latter will get none of the business. This situation is applicable to all the Missouri Pacific business between St. Joseph and Kansas City and all
180 points east thereof. The Burlington and other roads as direct and as connecting carriers compete therefor. A very large and substantial part of the business of the Missouri Pacific is carried from St. Joseph to Kansas City and St. Joseph and points between and is thus affected. The same situation exists as to other companies. The Chicago Great Western Railway between St. Joseph and Kansas City runs from Missouri, thence into Kansas, and back into Missouri, making the business interstate. The lines of the Burlington and St. Joseph & Grand Island companies between these points are wholly within the state. The lines of the St. Louis & San Francisco and Kansas City Southern companies between Kansas City and Joplin and the great lead and zinc mining districts of Missouri, start from Kansas City, Missouri, extend into Kansas, and thence back into Missouri, thus making the journey interstate. The Missouri Pacific line between these points is wholly state. The Missouri, Kansas & Texas also runs from Missouri into Kansas and back into Missouri, competing with lines wholly in the state. In each of these instances a very large and substantial part of the business of each of said companies originates and terminates in Missouri yet by passing in its journey out of the state is interstate. In each instance if the competing line wholly in the state is by state law compelled to lower its rate, those doing such interstate business must likewise reduce their rates between the same state points or do none of the business. All the complainants have joint tariffs with the others, doing one with the

other, a through connecting business. The laws complained of in the bills do therefore directly affect and interfere with a substantial part of traffic of the state which is interstate commerce originating and ending in the state, particularly much of that kind upon the lines of the Missouri Pacific, Chicago Great Western, St. Louis & San Francisco and Missouri, Kansas & Texas companies. The laws complained of are general in their nature, making neither classification nor exception. So by reason of the peculiar location of many of the large roads in Missouri a unique situation is presented whereby
181 wholly independent of the facts set forth in paragraph 3, state rates certainly directly and immediately affect interstate traffic both freight and passenger. So great an amount of interstate business is affected thereby that if it was permitted to be free from state regulation, and the other companies in the state refused to conform to the rates fixed by the laws by the bills herein questioned, they as competitors, whether original or connecting carriers, would lose so much state business that they would be compelled to carry at an actual loss that which remained of that class of traffic.

5. Much difficulty in the cases has been obviated by complainants making up and delivering to defendants, from time to time, statements showing the earnings and expenses for certain periods, which seem to have been treated by the parties as sufficiently illustrative of the situation to enable a fair determination of the controversy to be had. Complainants have extended to defendants every facility, given them the fullest opportunity, and granted them every possible courtesy, so that any experts for defendant have had every opportunity to call for any figures and to make up any statement upon any theory desired. Inasmuch as the same periods of time, in the various statements submitted, were adopted by both parties, the findings as to each company will follow along the same line, and actually mean that such period should be considered as representative of the situation generally. Inasmuch as the freight act of 1907 covered the same commodities as the Acts of 1905 but allowed an increased earnings, it follows as was conceded by defendants at the trial, if the freight act of 1907 was confiscatory, that of 1905 was likewise confiscatory but to a greater degree. It must therefore be said that the rates fixed by the laws complained of in the bills do, in fact, directly and immediately affect inter-state rates and directly regulate a large and substantial part of interstate commerce of the state and interstate carriage, freight and passenger, upon the Missouri Pacific, Chicago & Great Western, St. Louis & San Francisco, Kansas City Southern and Missouri, Kansas & Texas Railways and their connecting carriers.

182 6. The earnings in a state, from state and interstate business, can be ascertained with a reasonable degree of certainty from the way-bills, tickets and cash fares. The books and papers of complainants are and always have been so made and kept that it is a mere matter of expense, though considerable, and detail work, though extensive, to make the ascertainments. The freight earnings consist of earnings from transportation and from miscellaneous services, such as switching, demurrage, storage and track

rentals. Passenger earnings are those from passenger fares and miscellaneous services, such, for instance, as mail, express and excess baggage.

7. No serious difference has arisen in the separate cases as to the ascertainment of the expense of doing the entire passenger, freight or miscellaneous business in the state. So, with a reasonable degree of certainty, and with little controversy, this division can be and has been made. Inasmuch as these expenses are incurred by the use of the same properties, car tracks and facilities, there is not and never has been any certain known fixed rule or method by which, to a mathematical certainty, these different expenses so separated can be divided, as between state and interstate business. The method to be adopted in making the division was the chief serious controversy at the trial. Complainants claim that the division should be upon the revenue basis, in which way there can in the first instance, be assigned to each class of business, freight, miscellaneous freight, passenger and miscellaneous passenger, or to all or any of them combined, a reasonable and fair amount as state and inter-state expenses respectively to which should be added such sum as would represent the extra cost of doing state over interstate business. The defendants claim that the division should be, for freight, upon the ton-mile basis, and for passenger, upon the passenger-mile basis, and that miscellaneous freight earnings and expenses should be included in freight and miscellaneous passenger earnings in those of passenger. As the revenue proportion is, in most instances, nearly twice as much as the ton-mile proportion, the reason for the
183 difference is apparent. By the revenue basis is meant assigning as expense of state business, of any particular kind or kinds, such proportion of the total expense in the state on that class of business as the earnings from that class of state business bears to all the earnings (state and interstate) from the same class; or, as often put, ascertain what proportion all expenses are of all earnings, and then multiply the state earnings of any class thereby, thus finding a sum which would equal the expenses to be there assigned. By the ton-mile basis is meant the assignment to state freight expenses such proportion of all freight expense as the number of tons per mile of state freight bears to the total ton-miles of all freight hauled in the state. By the passenger-mile basis is meant the assignment as state passenger expenses such proportion of all passenger expenses as the number of passengers in state business carried one mile bears to the whole number of passengers (state and interstate) carried one mile.

Another method of division of freight expense is upon the basis of the number of tons carried, regardless of distance. In results there is little difference, as a division on this basis is practically the same as that which is shown by the revenue basis. Neither party has adopted it as a basis of division.

8. There being no method by which the division of expenses as between state and inter-state, can be made to a mathematical certainty, calculations have been made upon every reasonable basis, and a determination reached, in the light of all the evidence, of a

reasonable sum, in money, which should be actually charged as the expense of doing each class of state business. To this should be added the extra cost of doing the state business. The sums hereinafter found were first actually ascertained by a division upon a revenue basis. Then, after considering all things, they were and are adopted as the proper sums to reasonably represent an actual fair apportionment of expenses as between state and inter-state business. Any apportionment of freight expenses, upon a ton-mile basis would charge too small an amount as state expense.

184 This would make necessary the use of a multiple of extra cost, large enough to make the sum total of state freight expense equal that hereinafter accurately found to reasonably represent the cost as it ought from the evidence to be found. Any apportionment of passenger expense, upon the passenger mile or any other basis which would not make the state passenger expense equal in dollars the sum hereinafter found, would be unfair and unjust.

9. All things considered, the evidence duly weighed, there being no abnormal feature, the cost of doing the different classes of state business, ascertained as between state and interstate, upon a revenue basis, brings a result in dollars in Missouri which is fair, just, reasonable and representative. That method of ascertainment is much better and more satisfactory than any other which has, by anyone, been suggested. If the law be that some one theory must be adopted, then the revenue basis would be and is hereby accepted as correct. However, in these cases, although the ascertainment is actually made upon the revenue basis, the figures, when ascertained, have been considered in the light of all the facts and circumstances in evidence, and then in and of themselves and independently of their method of ascertainment, also adopted as fairly and justly representing the cost and expense of doing each class of state business.

10. There is an extra cost and expense of doing state over interstate business, both as to freight and passenger. This extra cost is as to each complainant, for freight, much in excess of fifty per cent of all freight expense, and for passenger in excess of twenty-five per cent of all passenger expense. While the extra cost is much in excess of these figures, yet, for the purpose of this case, they may, as to each complainant, be adopted as the minimum. How much more the extra cost is, need not be now determined, because at the minimum figures thus fixed, the rates in question are, in view of the case, unreasonable and confiscatory. If the ton-mile method of apportionment of freight expenses were adopted, the mul-

185 tiple of extra cost of doing each class of state business would be fixed as such figures as would make the entire expense as increased, equal to that hereinafter found, because, the total amount as found, regardless of the method of finding same, being that which fairly represents the minimum actual cost and expense of doing such state business.

11. After ascertaining the cost of doing the different classes of state business, and deducting same from the earnings there should be and there is deducted from the state freight earnings of each

complainant such sum as would equal its diminution of earnings *of each complainant such sum as would equal its diminution of earnings* upon the commodities covered by the act, if the rates thereon fixed thereby had been charged. This has been done as to each complainant.

12. In the case of each complainant, other than the St. Louis & Hannibal Railway Company, and Kansas City, Clinton & Springfield Railway Company, the earnings should be sufficient, in any event, to fully meet its proportion of the interest upon the bonded indebtedness, there being nothing out of the ordinary as to such indebtedness, and nothing to indicate that the property was unduly bonded. Such interest has been regularly paid for years, and there is nothing to indicate any improper bonding. The proportion of the property assignable to any of the state traffic, upon a revenue basis, is actually worth more than enough to justify such return. The proportions of the property of the St. Louis & Hannibal and the Kansas City, Clinton & Springfield respectively, assignable to any of the state traffic, are worth enough to justify some substantial return. However, irrespective of this finding and eliminating any question of interest, the rates in question are as hereinafter shown insufficient to make a fair and reasonable return upon the value of the portion of the property of each complainant devoted to the use.

13. Each class of business of each complainant should have
186 assigned to it its fair proportion of the value of the entire property in the state as that upon which it is entitled to a return. Such a division hereafter made, is upon a revenue basis. The result- reached thereby *is* so fair, just and reasonable that they are, in view of all the facts, adopted, regardless of the method of ascertainment. There has been fixed a minimum valuation for the railway property in the state. The property is worth at least that much. There is and should be assigned to each class of state business such proportion of such valuation as the gross state revenue of that class, bears to the gross revenue in the state. When this is done there is ascertained a sum which, in any event, is, considering all of the evidence, and regardless of the method by which the result is reached, the very least value upon which a reasonable return should be had as to that class of business. These figures, as to values, are probably less than the actual values, but for the purposes of the cases are taken as figures representing a minimum valuation upon which at least a fair return should be had, if any, because the rates in question at such valuation are confiscatory. It is therefore unnecessary to consider how much more the property is worth.

14. There are, therefore, in the cases tried, findings made and hereinafter set forth, showing: (*a*) All earnings, state and interstate, freight, miscellaneous freight, passenger and miscellaneous passenger; the proportions which state and interstate freight and passenger earnings (exclusive of miscellaneous) bear to all combined state and interstate freight and all passenger earnings (including miscellaneous) respectively, and that which they bear to

all earnings in the state. (*b*) Miscellaneous freight and miscellaneous passenger earnings, (undivided as between state and interstate) with the proportions they are of all earnings and of, respectively, all freight and passenger. (*c*) All expenses, divided in proportion to revenue, as between all kinds of freight and passenger business, including miscellaneous but undivided as between state and interstate. (*d*) A deduction from all state freight (exclusive of
187 miscellaneous), of such proportion of the expenses of all freight and all passenger respectively, as the freight and passenger respectively, exclusive of miscellaneous, bore to all freight and passenger earnings. (*e*) A like deduction of extra cost of doing such business respectively, including miscellaneous. (*f*) A deduction from freight earnings of sums equalling the diminution which would have been caused if the rates fixed by the act had been charged. (*g*) The value of that portion of complainants' property assignable to the particular traffic. This is ascertained by taking, for each class of business, of the entire value in the state such proportion as the earnings upon that portion of the business bear to all the earnings in the state.

The results thus reached and the sums finally ascertained irrespective of the methods by which the apportionments are made, in the light of all the facts and circumstances in evidence, are fair just and reasonable, and such as ought, in each instance, to be fixed. Anything in the way of a return less than six per cent. interest upon the part of the property assignable to any traffic in question is unreasonable and confiscatory.

15. The complainants made out and served their statements upon defendants, not dividing the miscellaneous as between state and interstate, for the reasons therein thus set forth:

"Inasmuch as differences might arise between complainant and the state as to the method of apportioning miscellaneous freight, and mail, express and miscellaneous passenger earnings, and as no question as to such earnings is here involved, same have to avoid confusion and unnecessary controversy, been left undivided as between state and interstate earnings."

No request was ever made for such a division, though it could have been made by complainants had a request been made therefor by defendants. The actual division could have been made by defendants had they so desired. If an accurate division were necessary it would even now be called for, regardless of the time necessary to be devoted to the work, though neither party is entitled to have the case delayed to obtain the information. To do so would
188 make necessary a possible change in some percentages, though not enough to change the result. As neither party thought an actual division was necessary, a court could well assume as the proofs clearly show, that if made, the final result of the case would not be changed thereby. As a matter of fact it would be fairer and better to deal alone with the effect of the laws in question upon strictly freight and passenger business. At the trial, however, the state's experts made an estimated division of these miscellaneous earnings, both freight and passenger, as between state and inter-

state, by arbitrarily assigning the same in the proportion of the revenue received from purely freight and purely passenger earnings respectively. This was an arbitrary basis, unwarranted in fact and made in a method which assigned entirely too great a proportion to the state business and improperly and unnecessarily enlarged the state earnings. It is, therefore rejected. From the figures hereinafter set forth, it will be seen that the miscellaneous earnings are but a small proportion of all earnings, especially of the freight. To avoid confusion in making new tabulations, the arbitrary division made by the state's experts may be assumed to be correct, still this would make no difference in the result of the cases. This because there should be charged against these earnings a sum equalling the revenue proportion of all the expense of freight and passenger respectively, plus an extra cost of doing state business. The sums ascertained in this way would be the fair, just and equitable charge as the minimum expense of doing such business. When so made there should be assigned as the valuation upon which there should be a return, such proportion of the entire value as the respective earnings from miscellaneous freight and passenger, bear to all earnings. When this is done it is apparent that no fair return is received upon this class of business. Hence, if the miscellaneous earnings were added to the freight and passenger earnings respectively, so as to consider all freight as a whole, and also all passenger as a whole, the result reached will not and could not be changed. Had a desire been, in proper time, expressed for an accurate division of miscellaneous earnings as between state and interstate, according to the facts, it would have been ascertained, so that the loss would have been shown, considering freight and passenger earnings alone, and also such loss considering the miscellaneous with each. However, the miscellaneous passenger business consists in the main of mail and express, and it is difficult to see why, in ascertaining the losses or gains under a two cent fare law there should be included either losses or gains from the miscellaneous earnings, especially when the main portion of the earnings are more in the nature of freight earnings from a passenger service.

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16. The expense of doing all the state business, when ascertained on the revenue basis, estimating the extra cost of doing the state freight business at the minimum of at least 50 per cent, and the passenger business at the minimum of at least 25 per cent, shows a sum which would be fair and reasonable to adopt as the cost of doing the entire state business. So that, if all the state business be considered as a whole and be done at the rates now in existence and those fixed by the laws questioned in the bills, there is no doubt that there is no reasonable or compensatory return upon the value of the portion of the property assignable to the whole of the state traffic. It is not here necessary to determine whether, as many competent railroad managers say, that no state rates are compensatory. It is true that such will be the result in Missouri, if the laws in question are enforced. There is a reason why, there, it is true. That state is peculiar in its central location, its class of business, and the location of its cities. The short line between the rivers, as

a transportation problem, necessarily fixes the rate for the enormous freight traffic passing to and from the east and the west. There are located at the two rivers two of the great markets of the United States. Freight rates are, by state laws and state commissions, fixed to a large extent upon a mileage basis. The result is that the vast traffic between Kansas City and St. Louis is done at the ex-
190 pense of a carriage of 280 miles and upwards, whereas, the compensation of the carrier is fixed upon the theory of a carriage of 198 miles. So with the passenger business. There are many large centers upon each side of the state, particularly the great cities, St. Louis, Kansas City and St. Joseph. There are many large competitive cities in the interior. There are great and marked differences in the respective distances between competitive points on the many different lines in the state. As passenger rates are fixed by law upon the mileage basis the necessary result is that every company has numerous instances in which it is put to the expense of a carriage of a long distance but is paid at a rate for a much shorter distance. Taking these facts into consideration, together with the extra cost of doing state business, it is a fact, whether all state business be treated as a whole or subdivided into classes, the rates now in existence and those fixed by the laws in question, fail to bring any fair or substantial return; nothing like one-half of the rate of interest which is fixed by law.

17. The adoption of the two cent fare did not cause any substantial increase in travel. At first a great many persons rode as state passengers to and from the state line, so that the state obtained more revenue than that to which it was entitled. Any statement of the passenger business which includes July and August, 1907, is unduly fair to the state. However, state and interstate fares soon became the same, and the longer the period over which the figures are extended the greater will be the loss shown.

18. If the companies had, after the two-cent passenger rate went into effect, been permitted to charge the amount which they, prior thereto, actually received per passenger per mile, they would have received this much more money:

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Name of road.	Period covered, months.	From State passengers.	From Interstate passengers.
St. L. & S. F. R. R. Co.....	12	666,008.72	509,738.63
A. T. & S. F. Ry. Co.....	12	30,885.52	66,271.03
C. R. I. & P. Ry. Co. and St. L. K. C. & C. Ry. Co.....	12	124,469.14	111,178.60
K. C. So. Ry. Co.....	12	7,044.49	27,260.75
St. L. & H. Ry. Co.....	12	37,275.38	145.23
M. K. & T. Ry. Co.....	12	140,593.46	63,815.12
K. C. C. & S. Ry. Co.....	12	14,654.57	10,846.91
C. B. & Q. R. R. Co.....	12	394,878.77	261,556.41
C. G. W. Ry. Co.....	12	65,945.96	46,162.17

19. In the case of the St. Louis & San Francisco Railway there were included in the expenses sums paid as rentals under a lease of

the Kansas City, Fort Scott & Memphis Railway. The common stock of the latter company is owned by the St. Louis & San Francisco, which operates the property under a lease, requiring it to pay to the holders of preferred stock of the Memphis as a rental a sum equal to a four-per-cent annual dividend thereon. There is nothing to impeach the fairness of the lease or its terms. It has been in existence for years. This rental has always been treated as an operating expense and not included in the fixed charges, nor included in the stock issue or bonded indebtedness or interest charge. It is therefore treated as it should be and in fact is, part of the expenses. The total amount charged in the accounts hereinafter set forth as part of the state freight expense is $8,428.56 and as part of the state passenger expense $7,443.68. If these items should be eliminated from the expenses, there would be no difference in the result.

20. The minimum values of the railway properties in the state belonging to and used by the complainants in Missouri are:

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	Miles.	Value.	Value per mile.
St. Louis and San Francisco (1907)	1688.89	61,238,414.70	36,259.00
Atchison, Topeka & Santa Fe (1907)	348.31	15,091,212.00	43,326.00
Chicago, Rock Island & Pacific (1907)	515.48	19,102,507.59	37,058.00
Kansas City Southern (1908)	174.48	8,039,084.40	46,075.00
St. Louis & Hannibal (1907)	120.61	1,143,007.02	9,477.00
Missouri, Kansas & Texas (1908)	506.21	20,894,229.93	41,276.00
Chicago Burlington & Quincy (1908)	1136.34	53,172,907.83	46,793.00
Kansas City Clinton & Springfield (1907)	151.01	2,380,222.48	15,762.00
Chicago Great Western (1907)	84.43	3,605,236.38	42,701.00

The sums thus found as the minimum values in all cases except those of the Kansas City, Clinton & Springfield and St. Louis & Hannibal, are in fact the same as estimated by the assessing officers of Missouri. In the cases of those two companies it is one third less. Nevertheless the valuations thus found are, aside from, and independently of the fact that they were estimates of the state, found in view of all the facts and circumstances in evidence to be the minimum fair and reasonable values of the properties.

21. There are now made and submitted, tables showing the earnings and expenses and assignable fixed charges and value of the complainants' property in the cases tried. From the expenses, even taxes and rentals are excluded, though probably they should not be. The periods over which the findings extend were, at the trial, adopted by the parties as fairly representative. They are in fact sufficiently fairly representative of the actual earnings and expenses, under ordinary and usual conditions, to be used as tests to determine whether the rates permit of a reasonable return upon the investment. They

were supported by statements covering other years and longer periods. These tables treat state freight as distinct from miscellaneous freight, and state passenger as distinct from miscellaneous pas-
193 senger, but do not charge against either freight or passenger earnings any expense of doing miscellaneous business, nor do they include in the assignable proportion of value or interest any part of that assignable to the miscellaneous business. Nor do these tables include the St. Louis Southwestern, Missouri Pacific, St. Louis, Iron Mountain & Southern, Quincy, Omaha & Kansas City, Wabash, St. Joseph & Grand Island, Chicago, Milwaukee & St. Paul, or Chicago & Alton Railways. This because the cases of these companies, by stipulations, are to abide the result in other cases as to which findings are made. These tabulations contain the figures agreed upon by the experts for both sides if the court should adopt the results reached by a revenue basis.

(A) St. Louis and San Francisco R. R. Company.

(1) Period Covered.

The representative period taken by the experts upon both sides as to this company *are* for three months ending September 30th, 1907, and in that period the earnings and expenses were as set forth in subdivisions (1) and (2).

(2) Earnings and Percentages.

Character.	Amount.	Per cent of all freight earnings.	Per cent of all earnings.
Interstate freight.....	$2,214,002.82	76.94	54.68
State freight.....	577,192.84	20.04	14.26
Miscellaneous freight.....	86,814.57	3.02	2.14
Total.....	2,878,010.23	100.	71.08
		Per cent of all passenger earnings.	
Interstate passenger.....	368,687.43	31.49	9.11
State passenger.....	599,051.59	51.17	14.79
Miscellaneous passenger...	203,077.28	17.34	5.02
Total.....	1,170,816.30	100.	28.92
Grand Total.....	4,048,826.53	.....	100.

194 (B) Expenses, Less Taxes & Rentals, Undivided Between State and Interstate.

All freight expense, including miscellaneous..... $1,802,813.26
All passenger expenses including miscellaneous..... 974,816.61

	Freight.	Passenger.
Percentage of expenses to earnings.....	62.64%	83.26%

(4) Taxes and Rentals.

Freight	$112,452.04
Passenger	38,979.63
Total	151,431.67

(5) State Earnings and Expenses.

	Freight.	Passenger.
State earnings above shown are	577,192.84	599,051.59
Expense of state business	361,644.33	498,716.20
Leaving	215,548.51	100,335.39
Less Taxes & Rentals (Par. 4)	22,760.29	20,097.90
Leaving	192,788.22	80,237.49
Deduct extra cost of state business freight estimated at 50%, passenger 25%	131,425.08	53,907.36
Leaving	61,363.14	26,330.13
Deduct diminution in earnings if the state freight rates in question had been charged	11,389.27	.....
Leaving as surplus	49,973.87	26,330.13

(6) Valuation.

Valuation of property in state is $61,238,414.70 of which 14.26% is assignable to state freight and 14.79% to state passenger business	2,183,149.48	2,264,290.38
Six per cent upon this part for the period covered is	130,988.97	135,857.42

(7) Return on Value.

In the way of a return upon the assignable value found in subdivision 6, the surplus shown in subdivision 5 is	2.29%	1.16%

(8) Interest Charge.

The actual interest charge paid, divided in the assignable proportions shown in subdivision 6 is	$116,792.45	$121,133.27

195 (B) ATCHISON, TOPEKA & SANTA FE R. R. COMPANY.

(1) Period Covered.

The representative period taken by the experts upon both sides as to this company *are* for six months ending Dec. 31, 1907, and in that period the earnings and expenses were as set forth in subdivisions (1) and (2).

(2) Earnings and Percentages.

Character.	Amount.	Per cent of all freight earnings.	Per cent of all earnings.
Interstate freight	$1,872,915.00	90.05	67.72
State freight	141,133.00	6.79	5.10
Miscellaneous freight	65,833.56	3.16	2.38
Total	2,079,881.56	100.	75.20
		Per cent of all passenger earnings.	
Interstate passenger	355,318.12	51.81	12.85
State Passenger	104,370.19	15.22	3.77
Miscellaneous passenger	226,080.00	32.97	8.18
Total	685,768.31	100.	24.80
Grand Total	2,765,649.87	.....	100.

(3) Expenses, Less Taxes & Rentals, Undivided Between State and Interstate.

All freight expense including miscellaneous	1,382,738.65
All passenger expense, including miscellaneous	572,167.20

	Freight.	Passenger.
Percentage of expenses to earnings	66.48%	83.43%

196 (4) Taxes & Rentals.

Freight	32,361.50
Passenger	10,854.04
Total	43,215.54

(5) State Earnings and Expenses.

	Freight.	Passenger.
State earnings above (par. 2) shown are	141,133.00	104,370.19
Expense of state business	92,581.89	87,834.09
Leaving	48,551.11	16,536.10
Less Taxes & Rental	3,503.41	901.74
Leaving	45,047.70	15,634.36
Deduct extra cost of state business freight estimated at 50%, passenger 25%	41,859.55	17,947.71
Leaving	3,188.15	Def. 2,313.35
Deduct diminution in earnings if the state freight rates in question had been charged	13,885.87	.....
Leaving	Def. 10,697.72	Def. 2,313.35

(6) Valuation.

Valuation of property in state is $15,091,212.00, of which 5.10% is assignable to state freight, and 3.77% to state passenger business	384,825.91	284,469.35
Six per cent upon this part for the period covered is	23,089.35	17,068.16

(7) Return on Value.

In the way of a return upon the assignable value found in subdivision 6, the deficit shown in subdivision 5 is	Nothing %	Nothing %

(8) Interest Charge.

The actual interest charge paid, divided in the assignable proportions shown in subdivision 6 is	17,934.56	13,257.51

197 (C) CHICAGO, ROCK ISLAND & PACIFIC RY. COMPANY.

(1) Period Covered.

The representative period taken by the experts upon both sides as to this company *are* for three months ending September 30, 1907, and in that period the earnings and expenses were as set forth in subdivisions (1) and (2)

(2) Earnings and Percentages.

Character.	Amount.	Per cent of all freight earnings.	Per cent of all earnings.
Interstate freight	$665,228.16	79.38	59.86
State freight	$150,953.68	18.02	13.58
Miscellaneous freight	$21,815.70	2.60	1.96
Total	$837,997.54	100.	75.40
		Per cent of all passenger earnings.	
Interstate passenger	$113,524.21	41.53	10.22
State passenger	114,853.04	42.02	10.33
Miscellaneous passenger	44,980.08	16.45	4.05
Total	$273,357.33	100.	24.60
Grand Total	$1,111,354.87	.....	100.00

(3) Expenses, Less Taxes and Rentals, Undivided Between State and Interstate.

All freight expense, including miscellaneous	$619,199.73
All passenger expense, including miscellaneous	317,633.62

	Freight.	Passenger.
Percentages of expenses to earnings	73.89%	116.20%

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(4) Taxes and Rentals.

Freight	$74,227.43
Passenger	21,015.44
Total	$95,242.87

(5) State Earnings and Expenses.

	Freight.	Passenger.
State earnings above (par. 2) shown are	$150,953.68	$114,853.04
Expense of state business	111,579.80	133,469.65
Leaving	$39,373.88	Def. 18,616.61
Less taxes and rentals	13,375.78	8,830.68
Leaving	$25,998.10	Def. 27,447.29
Deduct extra cost of state business freight estimated at 50%, passenger 25%	$41,919.82	17,501.61
Leaving	Def.$15,921.72	Def. 44,948.90

Deduct diminution in earnings if the state freight rates in question had been charged	$9,989.43	.....
Leaving	Def.$25,911.15	Def. 44,948.90

(6) Valuation.

Valuation of property in state is $19,102,507.59, of which 13.58% is assignable to state freight and 10.33% to state passenger business	$648,530.13	$493,322.26
Six per cent upon this part for the period covered is	$38,911.81	$29,599.34

(7) Return on Value.

In the way of a return upon the assignable value found in subdivision 6, the deficit shown in subdivision 5 is	Nothing %	Nothing %

(8) Interest Charge.

The actual interest charge paid, divided in the assignable proportions shown in subdivision 6, is	$24,907.02	$18,946.21

199 (D) KANSAS CITY SOUTHERN RAILWAY COMPANY.

(1) Period Covered.

The representative period taken by the experts upon both sides as to this Company *are* for six months ending June 30, 1908, and in that period the earnings and expenses were as set forth in subdivisions (1) and (2).

(2) Earnings and Percentages.

Character.	Amount.	Per cent of all freight earnings.	Per cent of all earnings.
Interstate freight	$702,249.91	79.35	67.11
State freight	38,748.76	4.38	3.70
Miscellaneous freight	144,046.62	16.27	13.77
Total	$885,045.29	100.	84.58
		Per cent of all passenger earnings.	
Interstate passenger	$89,504.58	55.47	8.55
State passenger	31,865.28	19.75	3.05
Miscellaneous passenger	39,973.54	24.78	3.82
Total	$161,343.40	100.	15.42
Grand Total	$1,046,388.69	.....	100.00

(3) Expenses, Less Taxes and Rentals, Undivided Between State and Interstate.

All freight expense, including miscellaneous	$571,297.54
All passenger expense, including miscellaneous	141,432.56

	Freight.	Passenger.
Percentages of expenses to earnings	64.55%	87.66%

200 (4) Taxes and Rentals.

Freight	$22,331.70
Passenger	3,737.37
Total	$26,069.07

(5) State Earnings and Expenses.

	Freight.	Passenger.
State earnings above (par. 2) shown are	$38,748.76	$31,865.28
Expense of state business	25,022.83	27,932.93
Leaving	$13,725.93	3,932.35
Less taxes and rentals	978.13	738.13
Leaving	$12,747.80	3,194.22
Deduct extra cost of state business freight estimated at 50%, passenger 25%	11,711.60	5,346.15
Leaving	$1,036.20	Def. 2,151.93
Deduct diminution in earnings if the state freight rate in question had been charged	2,957.58	.....
Leaving	Def. $1,921.38	Def. $2,151.93

(6) Valuation.

Valuation of property in state is $8,039,084.40, of which 3.70% is assignable to state freight, and 3.05% to state passenger business	$148,723.06	$122,596.04
Six per cent upon this part for the period covered is	8,923.38	7,355.76

(7) Return on Value.

In the way of a return upon the assignable value found in subdivision 6, the deficit shown in subdivision 5 is	Nothing %	Nothing %

(8) Interest Charge.

The actual interest charge paid, divided in the assignable proportions shown in subdivision 6, is.....	$5,295.38	$4,365.11

201 (E) St. Louis & Hannibal Railway Company.

(1) Period Covered.

The representative period taken by the experts upon both sides as to this company *are* for the year ending June 30, 1908, and in that period the earnings and expenses were as set forth in subdivisions (1) and (2).

(2) Earnings and Percentages.

Character.	Amount.	Per cent of all freight earnings.	Per cent of all earnings.
Interstate freight	$51,735.05	36.25	24.61
State freight	$87,941.99	61.62	41.84
Miscellaneous freight	$3,044.11	2.13	1.45
Total.....	$142,721.15	100.	67.90
		Per cent of all passenger earnings.	
Interstate passenger	$198.19	0.29	0.09
State passenger	52,667.38	78.04	25.05
Miscellaneous passenger	14,619.99	21.67	6.96
Total.....	$67,485.56	100.	32.10
Grand Total.....	$210,206.71	.....	100.

(3) Expenses, Less Taxes and Rentals, Undivided Between State and Interstate.

All freight expense, including miscellaneous.....	$117,908.81
All passenger expense, including miscellaneous.....	68,343.04

	Freight.	Passenger.
Percentages of expenses to earnings.....	82.61%	101.27%

202 (4) Taxes and Rentals

Freight	$5,994.07
Passenger	2,273.61
Total	$8,267.68

(5) State Earnings and Expenses.

	Freight.	Passenger.
State earnings above (par. 2) shown are	$87,941.99	$52,667.38
Expense of state business	$72,655.40	$53,334.91
Leaving	$15,286.59	Def. 667.53
Less taxes and rentals	$3,693.55	1,774.32
Leaving	$11,593.04	Def. 2,441.85
Deduct extra cost of state business freight estimated at 50%, passenger 25%	$12,026.69	2,444.68
Leaving	Def. $15,559.67	Def. $4,886.53
Deduct diminution in earnings if the state freight rates in question had been charged	15,126.02	.....
Leaving	Def. $433.65	Def. $4,886.53

(6) Valuation.

Valuation of property in state is $1,143,007.02, of which 41.84% is assignable to state freight, and 25.05% to state passenger business	$478,234.14	$286,323.26
Six per cent upon this part for the period covered is	$28,694.05	$17,179.40

(7) Return on Value.

In the way of a return upon the assignable value found in subdivision 6, the deficit shown in subdivision 5 is	Nothing %	Nothing %

(8) Interest Charge.

The actual interest charge paid, divided in the assignable proportions shown in subdivision 6, is	$16,359.44	$9,794.55

203 (F) Missouri, Kansas and Texas Railway Company.

(1) Period Covered.

The representative period taken by the experts upon both sides as to this company *are* for July, August, October, November and December, 1907, and January, 1908, and in that period the earnings and expenses were as set forth in subdivisions (1) and (2).

(2) Earnings and Percentages.

Character.	Amount.	Per cent of all freight earnings.	Per cent of all earnings.
Interstate freight	$1,333,455.26	81.73	57.89
State freight	$277,416.52	17.01	12.04
Miscellaneous freight	$20,603.37	1.26	0.89
Total	$1,631,475.15	100.	70.82
		Per cent of all passenger earnings.	
Interstate passenger	$303,214.54	45.12	13.16
State passenger	$246,368.53	36.66	10.70
Miscellaneous passenger	$122,458.22	18.22	5.32
Total	$672,041.29	100.	29.18
Grand Total	$2,303,516.44	.....	100.00

(3) Expenses, Less Taxes and Rentals, Undivided Between State and Interstate.

All freight expense, including miscellaneous	$1,010,643.65
All passenger expense, including miscellaneous	$516,589.98

	Freight.	Passenger.
Percentages of expense to earnings	61.95%	76.87%

204 (4) Taxes and Rentals.

Freight	$119,017.87
Passenger	$58,465.49
Total	$177,483.36

(5) State Earnings and Expenses.

	Freight.	Passenger.
State earnings above (par. 2) shown are	$277,416.52	$246,368.53
Expenses of state business	$171,910.48	$189,381.89
Leaving	$105,506.04	$56,986.64
Less taxes and rentals	$20,244.94	$21,433.45
Leaving	$85,261.10	$35,553.19
Deduct extra cost of state business freight estimated at 50%, passenger 25%	$66,590.77	$27,482.59
Leaving	$18,670.33	$8,070.60

Deduct diminution in earnings if the state freight rates in question had been charged	$20,222.85	.....
Leaving as surplus.....	Def. $1,552.52	$8,070.60

(6) Valuation.

Valuation of property in state is $20,894,229.93, of which 12.04% is assignable to state freight and 10.70% to state passenger business	$1,257,832.64	1,117,841.30
Six per cent upon this part for the period covered is.....	$75,469.96	67,070.48

(7) Return on Value.

In the way of a return upon the assignable value found in subdivision 6, the surplus shown in subdivision 5 is.....	Nothing %	0.72%

(8) Interest Charge.

The actual interest charge paid, divided in the assignable proportions shown in subdivision 6, is	$62,439.68	$55,490.41

205 (G) CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

(1) Period Covered.

The representative period taken by the experts upon both sides as to this company *are* for the year ending June 30, 1908, and in that period the earnings and expenses were as set forth in subdivisions (1) and (2).

(2) Earnings and Percentages.

Character.	Amount.	Per cent of all freight earnings.	Per cent of all earnings.
Interstate freight	$6,454,699.87	78.75	52.40
State freight	$1,580,529.64	19.28	12.83
Miscellaneous freight	$161,579.41	1.97	1.31
Total	$8,196,608.92	100.	66.54

		Per cent of all passenger earnings.	
Interstate passenger	$1,777,788.27	43.15	14.43
State passenger	$1,611,702.92	39.11	13.09
Miscellaneous passenger ...	$731,021.89	17.74	5.94
Total.....	$4,120,513.08	100.	33.46
Grand Total.....	$12,317,122.00	.....	100.

(3) Expenses (Less Taxes and Rentals) Undivided Between State and Interstate.

All freight expense, including miscellaneous.....	$6,793,610.60
All passenger expense, including miscellaneous.....	$3,527,311.81

	Freight.	Passenger.
Percentages of expenses to earnings.....	82.88	85.60

206 (4) Taxes and Rentals.

Freight	Cr. $12,235.30
Passenger	Cr. $6,152.58
Total.....	Cr. $18,387.88

(5) State Earnings and Expenses.

	Freight.	Passenger.
State earnings above (par. 2) shown are.....	$1,580,529.64	$1,611,702.92
Expense of state business.....	$1,324,453.83	$1,489,746.71
Leaving.....	$256,075.81	$121,956.21
Less Taxes and rentals.....	Cr. $2,487.99	2,798.50
Leaving.....	$258,563.80	$124,754.71
Deduct extra cost of state business freight estimated at 50%, passenger 25%	$484,129.29	$158,205.70
Leaving.....	Def. $225,565.49	Def. $33,450.99
Deduct diminution in earnings if the state freight rates in question had been charged...	$112,533.71	$.....
Leaving.....	Def. $338,099.20	Def. $33,450.99

(6) Valuation.

Valuation of property in state is $53,172,907.83, of which 12.83% is assignable to state freight, and 13.09% to state passenger business	$6,822,084.07	$6,960,333.63
Six per cent upon this part for the period covered is	$409,325.04	$417,620.02

(7) Return on Value.

In the way of a return upon the assignable value found in subdivision 6, the deficit shown in subdivision 5 is	Nothing %	Nothing %

207 (H) KANSAS CITY, CLINTON & SPRINGFIELD RY. COMPANY.

(1) Period Covered.

The representative period taken by the experts upon both sides as to this company *are* for the year ending June 30th, 1908, and in that period the earnings and expenses were as set forth in subdivisions (1) and (2).

(2) Earnings and Percentages.

Character.	Amount.	Per cent of all freight earnings.	Per cent of all earnings.
Interstate freight	$116,893.60	68.27	41.04
State freight	$45,003.15	26.29	15.80
Miscellaneous freight	$9,319.58	5.44	3.27
Total	$171,216.33	100.	60.11
		Per cent of all passenger earnings.	
Interstate passenger	$41,145.00	36.22	14.45
State passenger	$47,646.80	41.95	16.73
Miscellaneous passenger	$24,797.39	21.83	8.71
Total	$113,589.19	100.	39.89
Grand Total	$284,805.52	.....	100.

(3) Expenses (Less Taxes & Rental) Undivided Between State and Interstate.

All freight expense, including miscellaneous	$98,988.29
All passenger expense, including miscellaneous	$138,384.77

	Freight.	Passenger.
Percentages of expenses to earnings	57.81%	121.83

208 (4) Taxes and Rentals.

Freight	$9,182.36
Passenger	$5,749.38
Total	$14,931.74

(5) State Earnings and Expenses.

	Freight.	Passenger.
State earnings above (par. 2) shown are	$45,003.15	$47,646.80
Expense of state business	$26,024.02	$58,052.41
Leaving	$18,979.13	Def. $10,405.61
Less taxes and rentals	$2,414.04	$2,411.86
Leaving	$16,565.09	Def. $12,817.47
Deduct extra cost of state business freight estimated at 50%, passenger 25%	$8,483.30	$4,760.44
Leaving	$8,081.79	Def. $17,577.91
Deduct diminution in earnings if the state freight rates in question had been charged	$2,970.21	.....
Leaving	$5,111.58	Def. $17,577.91

(6) Valuation.

Valuation of property in state is $2,380,222.48, of which 15.80% is assignable to state freight, and 16.73% to state passenger business	$376,075.15	$398,211.22
Six per cent upon this part for the period covered is	$22,564.51	$23,892.67

(7) Return of Value.

In the way of a return upon the assignable value found in subdivision 6, the surplus shown in subdivision 5 is	1.36%	Nothing %

(8) Interest Charge.

The actual interest charge paid, divided in the assignable proportions shown in subdivision 5, is	$23,681.78	$25,287.48

209 (I) CHICAGO GREAT WESTERN RAILWAY COMPANY.

(1) Period Covered.

The representative period taken by the experts upon both sides as to this company *are* for six months, ending Dec. 31, 1907, and in that period the earnings and expenses were as set forth in subdivisions (1) and (2).

(2) Earnings and Percentages.

Character.	Amount.	Per cent of all freight earnings.	Per cent of all earnings.
Interstate freight	$224,169.58	86.02	57.39
State freight	$29,129.36	11.18	7.45
Miscellaneous freight	$7,280.24	2.80	1.86
Total	$260,579.18	100.	66.70
		Per cent of all passenger earnings.	
Interstate passenger	$72,360.87	55.62	18.53
State passenger	$38,105.03	29.28	9.75
Miscellaneous passenger	$19,643.99	15.10	5.02
Total	$130,109.89	100.	33.30
Grand Total	$390,689.07	.....	100.

(3) Expenses (Less Taxes and Rentals) Undivided Between State and Interstate.

All freight expense, including miscellaneous	$198,887.69
All passenger expense, including miscellaneous	$126,355.88

	Freight.	Passenger.
Percentages of expenses to earnings	76.33%	97.11%

210 (4) Taxes and Rentals.

Freight	$12,294.18
Passenger	11,312.16
Total	$23,606.34

(5) State Earnings and Expenses.

	Freight.	Passenger.
State earnings above (par. 2) shown are	$29,129.36	$38,105.03
Expenses of state business	$22,235.64	$36,996.98
Leaving	$6,893.72	$1,108.05
Less taxes and rentals	$1,374.49	$3,312.25
Leaving	$5,519.23	Def. $2,204.20
Deduct extra cost of state business, freight estimated at 50%, passenger 25%	$9,347.72	$6,090.35
Leaving	Def. $3,828.49	Def. $8,294.55
Deduct diminution in earnings if the state freight rates in question had been charged	$1,893.41	.....
Leaving	Def. $5,721.90	Def. $8,294.55

(6) Valuation.

Valuation of property in state is $3,605,236.38, of which 7.45% is assignable to state freight, and 9.75% to state passenger business	$134,295.06	$175,755.27
Six per cent upon this part for the period covered is	$8,057.70	$10,545.32

(7) Return of Value.

In the way of a return upon the assignable value found in subdivision 6, the surplus shown in subdivision 5 is	.....%	.....%

(8) Interest Charge.

The actual interest charge paid, divided in the assignable proportions shown in subdivision 6, is	$7,164.08	$9,375.81

211 22. If it should be assumed that the state experts correctly divided miscellaneous earnings as between state and interstate, which they did not do, still the fair and reasonable sum to be charged against the state part of these miscellaneous freight and passenger earnings is the revenue proportion of the entire freight and passenger expense plus a minimum extra cost for miscellaneous freight and for miscellaneous passenger. When this is done it clearly appears that even without an allowance for extra cost, the

result could not be changed if the findings already made as to state freight and passenger had included the miscellaneous, or had the miscellaneous of each class been separately considered. In no case would there be any fair return. If miscellaneous were considered separately, or if considered with freight and passenger respectively, the result would not be effected. This clearly appears from a tabulation now made as to each company with the exception of the St. Louis and Hannibal Ry. Company and the Kansas City, Clinton and Springfield Ry. Co., which are omitted for the reason that the state compiled and submitted no figures for these roads, showing: (*a*) The state experts' division of miscellaneous, though in fact it is too favorable to the state. (*b*) A deduction from earnings of the percentage proportion of expenses to earnings as done in Smyth v. Ames, 169 U. S. 466, which is the same as the revenue basis. (*c*) The minimum extra cost now found of doing the state over interstate being a mere fraction less than, and practically the same as, found as to the strictly freight and passenger. (*d*) The proportion that state's part of the miscellaneous was of all earnings, and the amount of return to which the company was entitled at six per cent interest upon that proportion of the value of the entire property as hereinbefore and now found to be fair, reasonable and just.

212 (1) St. Louis and San Francisco Railroad Company.

	Freight.			Passenger.		
	Amount.	% of all freight.	% of all earnings.	Amount.	% of all pass.	% of all earnings.
Miscellaneous state earnings	$17,953.25	00.62	00.44	$125,704.84	10.74	3.10
Less revenue proportion of expense 00.62% freight and 10.74% passenger	$11,177.44			$104,695.30		
Leaving	$6,775.81			$21,009.54		
Less increased cost freight 50%, passenger 25%	$5,588.72			$22,713.23		
Leaving	$1,187.09			Def. $1,703.69		
Less Taxes and Rentals	$697.20			$4,186.41		
	$489.89			Def. $5,890.10		
Amount due at 6% interest on portion of value assignable to the state part of the traffic	$4,041.74			$28,475.86		
Total Deficit..	$3,551.85			$34,365.96		

213 (2) Atchison, Topeka and Santa Fe Railway Company.

	Freight.			Passenger.		
	Amount.	% of all freight.	% of all earnings.	Amount.	% of all pass.	% of all earnings.
Miscellaneous state earnings	$4,608.35	00.22	00.17	$51,320.16	7.48	1.86
Less revenue proportion of expense 00.22% of freight and 7.48% passenger.	$3,042.02			$42,798.11		
Leaving	$1,566.33			$8,522.05		
Less increased cost freight 50%, passenger 25%.....	$1,521.01			$9,726.84		
Leaving	45.32			Def. 1,204.79		
Less Taxes and rentals	71.20			811.88		
Def..	25.88			Def. 2,016.67		
Amount due at 6% interest on portion of value assignable to the state part of the traffic	$769.65			$8,420.90		
Total deficit...	$795.53			$10,437.57		

214 (3) Chicago, Rock Island and Pacific Railway Company.

	Freight.			Passenger.		
	Amount.	% of all freight.	% of all earnings.	Amount.	% of all pass.	% of all earnings.
Miscellaneous state earnings	$4,035.91	00.48	00.36	$22,620.48	8.28	2.04
Less revenue proportion of expense 00.48% of freight and 8.28% passenger.	$2,966.88			$26,300.06		
Leaving	$1,069.03			Def. $3,679.58		
Less increased cost freight 50%, passenger 25%	$1,483.44			$5,907.98		
Leaving ..Def.	$414.41			Def. $9,587.56		
Less Taxes and Rentals	356.29			1,740.08		
Def.	$770.70			Def. $11,327.64		
Amount due at 6% interest on portion of value assignable to the state part of the traffic	$1,031.54			$5,845.37		
Total deficit...	$1,802.24			$17,173.01		

215 (4) Kansas City Southern Railway Company.

	Freight.			Passenger.		
	Amount.	% of all freight.	% of all earnings.	Amount.	% of all pass.	% of all earnings.
Miscellaneous state earnings	$7,533.64	00.85	00.72	$10,493.05	6.50	1.00
Less revenue proportion of expense 00.85% freight and 6.50% passenger.	$4,856.03			$9,193.12		
Leaving	$2,677.61			$1,299.93		
Less increased cost freight 50%, passenger 25%	$2,428.02			$2,107.35		
Leaving	249.59			Def. 807.42		
Less taxes and Rentals	$189.82			242.93		
	59.77			Def. $1,050.35		
Amount due at 6% interest on portion of value assignable to the state part of the traffic	$1,736.44			$2,411.73		
Total deficit ..	$1,676.67			$3,462.08		

216 (5) Missouri, Kansas and Texas Railway Company.

	Freight.			Passenger.		
	Amount.	% of all freight.	% of all earnings.	Amount.	% of all pass.	% of all earnings.
Miscellaneous state earnings	$3,547.90	00.22	00.15	$54,885.77	8.17	2.38
Less revenue proportion of expense 00.22% freight and 8.17% passenger.	$2,223.42			$42,205.40		
Leaving	$1,324.48			$12,680.37		
Less increased cost freight 50%, passenger 25%	$1,111.71			$9,505.26		
Leaving	212.77			$3,175.11		
Less taxes and Rentals	261.84			$4,776.63		
Def.	49.07			Def. $1,601.52		
Amount due at 6% interest on portion of value assignable to the state part of the traffic	$940.24			$14,918.48		
Total deficit ..	$989.31			$16,520.00		

217 (6) Chicago, Burlington and Quincy Railroad Company.

	Freight.			Passenger.		
	Amount.	% of all freight.	% of all earnings.	Amount.	% of all pass.	% of all earnings.
Miscellaneous state earnings	$31,743.33	00.39	00.26	$347,600.91	8.44	2.82
Less revenue proportion of expense 00.39% freight and 8.44% passenger.	$26,495.08			$297,705.12		
Leaving	$5,248.25			$49,895.79		
Less increased cost freight 50%, passenger 25%	$13,247.54			$66,666.19		
Leaving	Def. 7,999.29			Def. 16,770.40		
Less Taxes and Rentals	Cr. 47.72			Cr. 519.28		
	Def. $7,951.57			Def. $16,251.12		
Amount due at 6% interest on portion of value assignable to the state part of the traffic	$8,294.97			$89,968.56		
Total deficit	$16,246.54			$106,219.68		

218 (7) Chicago Great Western Railway Company.

	Freight.			Passenger.		
	Amount.	% of all freight.	% of all earnings.	Amount.	% of all pass.	% of all earnings.
Miscellaneous state earnings	$837.23	00.32	00.21	$6,777.18	5.21	1.73
Less revenue proportion of expense 00.32% freight, and 5.21% passenger.	$636.44			$6,583.14		
Leaving	$200.79			$194.04		
Less increased cost freight 50%, passenger 25%	$318.22			$1,541.54		
Leaving	Def. 117.43			Def. $1,347.50		
Less taxes and Rentals	39.34			589.36		
	Def. $156.77			Def. $1,936.86		
Amount due at 6% interest on portion of value assignable to the state part of the traffic	$227.13			$1,871.12		
Total deficit	$ .90			$3,807.98		

219 23. If the commodities affected by the Freight Act of 1907 are alone considered, irrespective of and separate from the earnings from other freight, the rates are plainly confiscatory, and not only fail to bring any return upon the portion of the property devoted to such use, but do not enable any complainant to meet operating expenses. The following tables are in this respect submitted as findings of the earnings of and expenses fairly chargeable to these commodities for a period which is representative.

(1) St. Louis & San Francisco.

For the three months representative period the result is:

The gross earnings upon the commodities affected by the Freight Act of 1907, for three months, are $56,699.26, or $226,797.04 for the year, which is 10.94% of all state freight earnings. Applying this to the state freight statement, there is the result:

All earnings from this class of state freight were for 3 months	$56,699.26
All state freight expenses were $382,405.32 for three months, and 10.94% thereof chargeable to these commodities	41,835.14
	$14,864.12
Diminution if the rates fixed by the Act of 1907 had been charged	11,389.27
	$3,474.85
10.94% of Extra cost at 50%, $130,246.94	$14,249.02
10.94% of Interest, $117,775.28	12,884.62
10.94% of Valuation, $132,091.26	14,450.78

220 (2) Atchison, Topeka & Santa Fe.

The gross earnings upon the commodities affected by the Freight Act of 1907, for six months are $47,137.00, or $94,274.00 for the year, which is 33.4% of all state freight earnings. Applying this to the findings as to state freight, there is this result:

All earnings from this class of state freight were for six months	$47,137.00
All state freight expenses were $96,085.30 and 33.4% thereof chargeable to these commodities	32,092.49
Leaving	$15,044.51
Diminution if the rates fixed by the Act of 1907 had been charged	$13,885.87
	$1,158.64
33.4% of Extra cost at 50%, $43,443.57	$14,510.15
33.4% of Interest, $17,934.56	5,990.14
33.4% of Valuation, $23,089.55	7,711.91

(3) CHICAGO, ROCK ISLAND & PACIFIC.

For the three months' representative period July, August and September, 1907, there was this result:

Revenue actually received on said commodities being 7.24% of total revenue actually received on all freight traffic in Missouri for said three months	$60,639.75
Operating expenses, taxes, rentals and hire of equipment applicable to said revenue for said three months arrived at as follows:	
Total operating expenses, taxes, rentals and hire of equipment, assigned to freight traffic $693,427.16. Proportion (7.24% based on revenue) assigned to commodities affected by maximum freight act of 1907	50,204.13
Net revenue on said commodities for said three mos.	$10,435.62
Deduct the diminution in revenue if said act of 1907 had been in effect	9,989.43
Leaving	$446.19
Deduct extra cost of transporting state freight traffic, assuming such extra cost to be 50%. Schedule 4 shows that 50% increased cost increases revenue percentage from 18.02% to 24.79%, an increase of 6.77% or 37.57%. 37.57% of 7.24% equals 2.72%. 2.72% of total operating expenses excluding taxes, rentals, etc., $618,100.58, equals	16,812.34
Deficit	$16,366.15

(4) KANSAS CITY SOUTHERN.

The gross earnings upon commodities affected by the Act of 1907 for six months on $14,014.31 or $28,028.62 for the year, which is 36.17% of all state freight earnings. Applying this to the state freight statement there is this result:

All earnings from this class of state freight were for six months	$14,014.31
All state freight expenses were $26,000.96 and 36.17% of this amount would be	9,404.55
Leaving	$4,609.76
Diminution if rates fixed by the Act of 1907 had been charged	2,957.58
	$1,652.18

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36.17% of extra cost at 50%, $11,735.85	$4,244.86
36.17% of interest, $5,295.38	1,915.34
36.17% of valuation, $13,768.01	4,979.89

(5) ST. LOUIS & HANNIBAL.

The gross earnings upon commodities affected by the Act of 1907 for one year are 33%, or $29,020.86. Applying this to the state freight statement there is this result:

All earnings from this class of freight were	$29,020.86
All state freight expenses were $76,348.95 and 33% of this amount is	25,195.15
Leaving	3,825.71
Diminution if rates fixed by the Act of 1907 had been charged	15,126.02
Deficit	11,300.31
33% of extra cost at 50%, $12,026.69	$3,968.81
33% of interest, $16,359.44	5,398.61
33% of valuation, $43,041.07	14,203.55

(6) MISSOURI, KANSAS & TEXAS.

Gross earnings on commodities affected by the Act of 1907 for six months (at 33% of total state freight earnings) would be $91,547.45 or $183,094.90 for the year.

Applying this to the state freight statement there is this result:

All earnings from this class of freight were, for six months	$91,547.45
All state freight expenses were $192,155.42 and 33% of this amount would be	63,411.29
223 Leaving	$28,136.16
Diminution, if rates fixed by Act of 1907 had been charged	20,222.85
	$7,913.31
33% of extra cost at 50%, $73,879.86	$24,380.00
33% of interest, $62,439.68	20,605.09
33% of valuation, $75,469.96	24,905.09

(7) CHICAGO, BURLINGTON & QUINCY.

The gross earnings upon commodities affected by the Act of 1907 for one year were $526,532.72, which is 31.92% of all state freight earnings, for the year 1905.

Applying this to the state freight statement there is this result:

All earnings from this class of state freight were for one year (31.92% of $1,580,529.64)	$504,505.06
All state freight expense- were $1,322,165.90, and 31.92% of this amount is	422,035.35
Leaving	$82,469.71
Diminution, if the rates fixed by the Act of 1907 had been charged	117,388.07
Deficit	$34,918.36
31.92% of extra cost at 50%, $472,092.76	$150,692.00
31.92% of valuation, $409,325.04	130,656.55

(8) KANSAS CITY, CLINTON & SPRINGFIELD RAILWAY COMPANY.

The gross earnings upon commodities affected by the Act of 1907, for one year are $14,365.00. Since the figures of the company do not show miscellaneous freight earnings, they are estimated
224 at 31.92% of all state freight, based on C. B. & Q. figures, as the percentage is the smallest with that company. Applying this to the state freight statement there is this result:

Earnings from this class of state freight were, for one year	$14,365.00
All state freight expenses were $28,438.06 and 31.92% of this amount is	9,077.43
Leaving	5,287.57
Diminution, if rates fixed by the Act of 1907 had been charged	2,970.21
	$2,317.36
31.92% of extra cost at 50%, $8,483.30	$2,707.87
31.92% of interest, $23,881.78	7,624.06
31.92% of valuation, $33,846.76	10,803.89

Such an estimate as to this company is reasonable, in that this company is actually losing money upon all its business, so that a finding as to these matters is unnecessary.

(9) CHICAGO GREAT WESTERN.

Gross earnings on commodities affected by the Act of 1907 for three months were $7,817.28, or $31,269.12 for the year, which is 57.81% of all state freight earnings.

Applying this to the state freight statement, there is this result:

All earnings from this class of state freight were (earnings of 3 months $7,817.28 x 2)	$15,634.56
All state freight expenses were $23,610.13 and 57.81% of this amount would be	13,649.02
Leaving	$1,985.54
225 Diminution if rates fixed by the Act of 1907 had been charged	1,777.34
	$208.20
57.81% of extra cost at 50%, $9,347.72	$5,403.92
57.81% of interest, $7,164.08	4,141.55
57.81% of valuation, $8,057.70	4,658.16

(10) OTHER COMPANIES.

As the cases of the other companies abide the result of that of some other case, a finding in this respect is unnecessary.

226 Afterwards, to-wit, on the 30th day of December, 1908, a Certificate of the Trial Judge was filed. Said Certificate is in words and figures as follows, to-wit:—

In the Circuit Court of the United States, Western District of Missouri, Western Division.

No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY
vs.
HERBERT S. HADLEY, Attorney General, and Others.

No. 2989.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
vs.
JOSEPH P. RICE and Others.

No. 2990.

THE ST. LOUIS SOUTH WESTERN RAILWAY COMPANY
vs.
JOSEPH P. RICE and Others.

No. 2991.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 2992.

THE ST. LOUIS, KANSAS CITY & COLORADO RAILROAD CO.
VS.
JOHN A. KNOTT and Others.

No. 2993.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY
VS.
JOHN A. KNOTT and Others.

No. 2994.

THE ST. LOUIS & HANNIBAL RAILWAY COMPANY
VS.
JOHN A. KNOTT and Others.

No. 2995.

THE MISSOURI PACIFIC RAILWAY COMPANY
VS.
JOHN A. KNOTT and Others.

No. 2996.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO.
VS.
JOHN A. KNOTT and Others.

227 No. 2997.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
VS.
JOHN A. KNOTT and Others.

No. 2998.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY
VS.
JOHN A. KNOTT and Others.

No. 2999.

QUINCY, OMAHA & KANSAS CITY RAILWAY COMPANY
VS.
JOHN A. KNOTT and Others.

No. 3000.

THE WABASH RAILWAY COMPANY
VS.
JOHN A. KNOTT and Others.

No. 3001.

THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 3002.

KANSAS CITY, CLINTON & SPRINGFIELD RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 3003.

CHICAGO GREAT WESTERN RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 3006.

THE CHICAGO & ALTON RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

Certificate.

Heretofore this court by order made on the 5th day of March, 1906, referred each and all of the foregoing eighteen cases to F. L. Schofield, a Special Master, to take the evidence and report the same to this court, with certain findings, as will appear from
228 the order now of record.

Later on the said Schofield proceeded with said hearing and took certain evidence, much of it being oral testimony taken down by stenographers and duly transcribed, and other evidence being in the form of exhibits.

Later on this court by agreement of parties, to-wit, on the 13th day of June, 1908, made an order that the said cases should come on for trial October 5th, 1908, to the Court on the evidence thus taken by the said Special Master, Mr. Schofield, together with such other and further evidence as might be submitted by the respective parties.

October 5th, 1908, the hearing of said cases was upon the application of the defendants continued until the 9th day of November, 1908, at which time the hearing of said cases was proceeded with and continued *with* until and including November 14th, 1908, at

which time there was an adjournment of the hearing until December 14th, 1908, when the hearing was again resumed and proceeded with until the 30th day of December, 1908, when said hearing was concluded and each, all and every of the parties rested.

The said cases were heard and are to be determined only upon the evidence received by the court, consisting in part of the evidence taken before the Special Master, Mr. Schofield, and in part received by the court in open court, and there was no other or further evidence received by the court or offered by any party other than that hereinafter scheduled. And in the event of an appeal of any or all of the cases, the clerk will certify to said evidence, subject, however, to such rights as the parties may have under the laws and rules of the Appellate Court to designate what shall be certified up and what omitted.

The evidence so taken by the Special Master, returned and filed in open court, and offered in evidence as hereinbefore stated, is as follows:

Five volumes designated as in case No. 2998, marked Volumes I to V, both inclusive, and one volume designated, "2998,
229 Chicago, Burlington & Quincy: Index and Exhibits." Also annual statements of the Chicago, Burlington & Quincy Railroad Company to the Railroad Commissioners for the years ending respectively, June 30th, 1904, June 30th, 1905, June 30th, 1906, (three copies).

Also four volumes returned designated as "2995: Missouri Pacific," marked respectively, volumes I to IV, inclusive, together with one volume marked "2995, Missouri Pacific Railway: Index and Exhibits." Also the tax return of the Missouri Pacific for June 1st, 1904, June 1st, 1905, the 26th Annual Report of the Missouri Pacific Railway, Exhibit- 34, 36*b*, and 24, in case No. 2995. Also seven analytical sheets of the Missouri Pacific Railway upon form #1939, and seven analytical sheets of the Missouri Pacific Railway upon form #1941, and two analytical sheets of the Missouri Pacific Railway upon form #1940, in case No. 2995.

Also four volumes of testimony marked I to IV, inclusive, in case No. 3000, Wabash Railroad. Also one volume endorsed, "3000 Wabash Railroad: Index and Exhibits." Also exhibits marked in case No. 3000 and being designated "Exhibit 15," being the 15th and 17th Annual Report- of the Directors of the Wabash Railroad Company for the years ending June 30th, 1904, and June 30th, 1906, respectively. Also the 15th and 16th Annual Report- of the Directors of the Wabash Railroad Company for the years ending June 30th, 1904 and June 30th, 1905, respectively, each marked "Exhibit 16." Also the 16th and 17th Annual Reports of the Directors of the Wabash Railroad Company for the years ending respectively, June 30th, 1905 and June 30th, 1906, each marked "Exhibit 17."

Also one volume returned by the Special Master marked "2989, Atchison, Topeka & Santa Fe Proceedings," as showing certain proceedings had before him the said Special Master.

All the evidence offered before the said Special Master and re-

turned into court and used in these cases and all the proceedings had therein, are included in the papers thus specifically enumerated, each volume and document hereinbefore referred to being now identified by the endorsement thereon of the Trial Judge, "Smith McPherson, Judge."

230 And pursuant to the order of the court and by agreement of parties the said cases came on for trial to the Court, November 9th, 1908, and said trial was continued from time to time with certain adjournments until December 30th, 1908, when the trial of all the cases was concluded and the said cases by the Court taken under advisement. The evidence taken before the court in open court is contained in volumes identified as follows:

Volume I, marked filed by the clerk, December 30th, 1908, and further identified by the signature of Smith McPherson, Trial Judge. Volume II, marked filed by the Clerk December 30th, 1908 and further identified by the signature of Smith McPherson, Trial Judge. Volume III, marked filed by the Clerk December 30th, 1908, and further identified by the signature of Smith McPherson, Trial Judge. Volume IV, marked filed by the Clerk December 30th, 1908, and further identified by the signature of Smith McPherson, Trial Judge. Volume V, marked filed by the Clerk December 30th, 1908, and further identified by the signature of Smith McPherson, Trial Judge, said Volume V being made up of exhibits, which together with the exhibits hereinafter scheduled, each and all being marked filed by the Clerk December 30th, 1908, and further identified by the signature of Smith McPherson, Trial Judge, are all the exhibits offered in open court in the trial of said cases; the exhibits other than those in Volume V being as follows: Exhibits A, B, C, D, E, G, H, I, and Exhibits No. 54, 59, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 4, and Exhibit "Douglas I". And said cases hereinbefore entitled were heard and fully submitted to the Court on the evidence and the exhibits hereinbefore scheduled, and on no other evidence than that hereinbefore scheduled. And each, all and every of the parties before final submission after the introduction of the foregoing, by counsel in open court said no further evidence was desired or would be offered in the cases.

231 This certificate is now signed and ordered filed as of this date after the submission of the cases and all of them.

Done in open court this December 30th, 1908.

(Signed) SMITH McPHERSON, *Judge.*

232 Afterwards, to-wit, on the 30th day of December, 1908, the following order was filed and entered of record:

UNITED STATES OF AMERICA, *sct*:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. 3004.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY
vs.
JOHN A. KNOTT et al.

Also

In Equity.

RAILROAD COMPANIES
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2988, 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3003 & 3006.

Now on this day again come the parties by their solicitors. Thereupon the hearing of evidence is concluded, whereupon both parties rest, and this case is fully submitted and is by the Court taken under advisement and the orders and decree herein will be rendered and entered of record as of this date.

(Signed) SMITH McPHERSON, *Judge*.

December 30, 1908.

233 Afterwards, to-wit, on the 21st day of January, 1909, the following order was filed and entered of record, to-wit:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2938.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY
vs.
HERBERT S. HADLEY, Attorney General, and Others.

No. 2989.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
vs.
JOSEPH P. RICE and Others.

No. 2990.

THE ST. LOUIS SOUTH WESTERN RAILWAY COMPANY
vs.
JOSEPH P. RICE and Others.

No. 2991.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO.
VS.
JOHN A. KNOTT and Others.

No. 2992.

THE ST. LOUIS, KANSAS CITY & COLORADO RAILROAD CO.
VS.
JOHN A. KNOTT and Others.

No. 2993.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY
VS.
JOHN A. KNOTT and Others.

No. 2994.

THE ST. LOUIS & HANNIBAL RAILWAY COMPANY
VS.
JOHN A. KNOTT and Others.

No. 2995.

THE MISSOURI PACIFIC RAILWAY COMPANY
VS.
JOHN A. KNOTT and Others.

No. 2996.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO.
VS.
JOHN A. KNOTT and Others.

No. 2997.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
VS.
234 JOHN A. KNOTT and Others.

No. 2998.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY
VS.
JOHN A. KNOTT and Others.

No. 2999.

QUINCY, OMAHA & KANSAS CITY RAILWAY COMPANY
VS.
JOHN A. KNOTT and Others.

No. 3000.

THE WABASH RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 3001.

THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 3002.

KANSAS CITY, CLINTON & SPRINGFIELD RAILWAY CO.
vs.
JOHN A. KNOTT and Others.

No. 3003.

CHICAGO GREAT WESTERN RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 3006.

THE CHICAGO & ALTON RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

Order.

Each of the foregoing causes came on for hearing this January 20, 1909, the parties appeared by counsel, and admitted that the term of office of Herbert S. Hadley as Attorney General had expired, and Elliott W. Major was the duly qualified and acting successor and Attorney General of Missouri. He appeared in person, and by the consent of himself and all counsel in the cases, it is ordered that without any formal pleadings, Elliott W. Major, as Attorney General of Missouri be and he is hereby substituted for and in the
235 stead of Herbert S. Hadley, so that all pleadings against and on behalf of said Hadley shall apply to the substituted party as fully as if made against and for him.

(Signed) SMITH McPHERSON, *Judge.*

Afterwards, to-wit, on the 20th day of February, 1909, the following order was filed and entered of record, to-wit:—

In the Circuit Court of the United States, Western District of Missouri, Western Division.

No. 2988. Equity.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY
vs.
HERBERT S. HADLEY, et al.

And Equity Cases No. 2989, 2991, 2993, 2994, 2997, 2998, 3002, 3003.

Order.

Whereas, after the cases above numbered had been submitted and argued by agreement of all parties at the request of the Court James Peabody and F. P. Johnson, expert accountants for the railroad companies, and A. P. Taliaferro and T. A. Hamilton, expert accountants for the defendants, compiled statements showing the earnings, operating expenses, etc., for each of said railroad companies for periods of time as therein stated, and affixed a certificate to the effect that said statement in each case correctly shows the results on the various assumptions set forth therein, which said certificate was signed by all four of said expert accountants.

It is therefore ordered that each of said statements be filed and made of record herein.

Done in open court this February 20th, 1909.

(Signed) SMITH McPHERSON, *Judge.*

236 Afterwards, to-wit, on the 6th day of March, 1909, the following order was filed and entered of record, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY
vs.
HERBERT S. HADLEY et al.

And also Numbers 2989 to 3004, Inclusive, and 3006.

Order.

By consent of parties, in accordance with agreements heretofore made and not recorded, it is on this March 6th, 1909, ordered:

1. The answers heretofore filed by the Attorney General and Railroad Commissioners, to which replications were filed, shall be treated and adopted by the other defendants who heretofore demurred herein, as their answers duly replied unto.

2. All the evidence taken before the Special Master and in open court, regardless of the particular case in which it was offered, shall be regarded as having been taken and offered in each of the cases tried.

(Signed) SMITH McPHERSON, *Judge.*

We consent to the above order.
FRANK HAGERMAN,
Solicitor for Complainant.
E. W. MAJOR,
Att'y General;
SANFORD B. LADD,
JOHN KENNISH,
F. W. LEHMANN,
Solicitor- for Appearing and Answering Defendants.

237 Afterwards, to-wit, on the 8th day of March, A. D. 1909, the same being a day of the regular November term of said Court, a findings of fact was filed. Said findings of fact is in words and figures as follows:

In the Circuit Court of the United States, Western District of Missouri, Western Division.

No. 2988. Equity.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY
vs.
HERBERT S. HADLEY et al.

And Equity Cases No. 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3006.

Findings of Fact.

Prior to the argument the Court requested counsel on both sides to submit requests for findings of fact. Complainants' counsel did this. Defendants' counsel have not done so. Complainants' requests have been considered, some of which are embodied within the following findings, and some are not.

The following are the findings of fact that the Court makes as based upon the evidence herein:

1. The complainants are the eighteen railroad companies owning and operating lines of railroad in Missouri, they doing all of the state and interstate railroad business therein, and all of them except the St. Louis & Hannibal Company having lines of railroad both

within and without the state. That company is wholly within the state, extending from Hannibal, Missouri, to the south 120.61 miles. The Kansas City, Clinton & Springfield Company is a road of about 160 miles in length with 151.01 miles in the state. All
238 the other companies have lines extending into a number of other states, one of them extending into thirteen other states and territories. These roads with their own lines and with their connecting carriers, carry all the traffic and do all the business, freight and passenger, within the state, whether of state or interstate character. The intrastate business is at all times herein referred to as state business. That part of the interstate business which neither originates within, nor has its destination within, but passes across the State of Missouri, is called trans-state business.

2. The same roadbed, locomotives, cars, and trains including all facilities, are used for both classes of business, state and interstate. It is not practicable to conduct the business in any other way. This is so both from the standpoint of the public and that of the companies. If state business were to be carried alone upon some cars and trains, and interstate alone upon others, the expenses would be enormously increased, and almost if not quite prohibitive, while the public would be subjected to delays, inconveniences, and great expense. By reason of all this the business cannot practically be separated.

3. Both from a geographical and railway standpoint Missouri is situated differently from the other states of the Union, there only being two or three other states that have a resemblance to it in these particulars, and each of them in a lesser degree. This is so because the Mississippi is its boundary on the east all the distance. From a railroad standpoint the Missouri River is its boundary line on the west, although physically the Missouri River is only the western boundary line from the northwest corner of the state about half way to the southwest corner. But at the half way point, namely, Kansas City, the river turns directly to the east, and continues its way to the Mississippi River. In its production, business, and commerce all that part of Missouri to the north of the Missouri River is practically like the south half of Iowa, the country districts producing large quantities of live stock and grain for the market, as well as much bituminous coal. The south half of Missouri is entirely different. The amount of grain and live stock is much less than in the north half of the state. But the south half has a large amount of timber, stone, lime, lead, zinc, iron, and fruits. St. Louis on the east is a city of nearly a million people, Kansas City on the west nearly half as many, while St. Joseph has more than one hundred and twenty-five thousand people. These three cities carry on large manufacturing interests. The grain, live stock, and
239 packing house interests at Kansas City and St. Joseph are enormous. For a third of a century or more for reasons which need not be repeated, rates from the East were fixed to the Mississippi River, and later on, from thence to the Missouri River. The interstate rates either in or out were the one plus the other. It

was the same from the West. It was likewise the same for the transstate business going in either direction. Such is the method existing to-day. This brought about the fact which for years has existed and exists to-day, that the short line of road between the two rivers fixes the freight rates. To illustrate, the Burlington road is the short line between the rivers, being 198 miles from Hannibal to St. Joseph, and the same distance, within a few miles, to Kansas City. The roads between Kansas City and St. Louis, and there are four at least of them, including the Burlington, is an average distance of nearly 300 miles, but some of the roads being fifty miles or more farther between the points than the others. This brings about the fact that all freight rates between any one point on the one river and any point on the other river are the same as the rate from Hannibal to St. Joseph over the Burlington line. That is to say, the freight rates on any road regardless of distance are the same between St. Louis and either Kansas City or St. Joseph that they are between Hannibal and St. Joseph over the Burlington line. This has given the three cities of St. Louis, Kansas City, and St. Joseph great advantages over other points. Competent persons say that to change this system will work irreparable harm to the three cities named, as well as to all other places within the state, by driving both the jobbing and manufacturing business to seaboard points. As to this no finding is made nor opinion expressed because it is believed to be a matter of policy upon which this Court in these cases should express
240 no opinion. As to the passenger rates, by reason of competition the fare is the same between Kansas City and St. Louis, the shorter line fixing the rates, thereby compelling the longer road to be at much expense without remuneration. This is likewise true as to all competitive points.

As to the foregoing question of rates and fares, there is no United States statute governing the same, and there is no Missouri statute upon the subject except the two statutes questioned by the bills, one dealing with certain commodities per car per distance, and the other fixing the passenger fares at two cents. Aside from these two statutes, and as to any bearing they have as to charges between the two riverts, the conditions named have been brought about and exist today by reason of a long time custom and by reason of transportation, actual and probable, upon the two rivers.

Still further bearing on the question are the following facts: Joplin is a city in the southwestern part of the state of more than twenty-five thousand people. There are a number of towns adjacent thereto, giving that county (Jasper) a population of 200,000 people. It is a very large mining district of lead and zinc. Between Kansas City and Joplin three of complainants herein have railroads. The Missouri Pacific at all points between the said places is within the state. Each of the other two between said points is partly without the state, starting within and going out and coming back, thereby making it interstate business as to two of the roads between Kansas City and the Joplin district. Between Kansas City and St. Joseph, four roads do the business. The Missouri Pacific and Chicago Great Western is each part of the distance within the State of Kansas,

while the Burlington and St. Joseph & Grand Island Company is each wholly within the State of Missouri between the two cities. Between St. Joseph and St. Louis two of complainants do practically all the business, which is very large in both passenger and freight. These are the Burlington and Missouri Pacific. Between said cities the Burlington line is wholly within the state. But the Missouri pacific line is partly within the State of Kansas, crossing the
241 Missouri River at Atchison and coming back into the state at Kansas City. On the foregoing facts the finding is that the short line between two competitive points necessarily fixes the rate, and the Missouri statutory rates under the statutes in question fix the rates between the cities named. But this is so solely because of the geographical location of cities and railroads, and competition, and long time custom. It is not so either because of a statute or any judicial determination by any of the Courts of Missouri.

4. Pending this litigation each of the complainant companies made and delivered to defendants statements showing the earnings and expenses for certain periods, which statements have been taken by both sides as sufficiently illustrative of the situation for the determination of these cases. The companies extended to the state officers, defendants herein, acting by experts by them selected, the opportunity to examine the statements and the books, papers, vouchers, and records of the companies. The freight rate statute of 1907 as to commodities mentioned allowed greater rates than did the statute of 1905 assailed by the original bills of complaint herein, and it was conceded at the trial that if the rates fixed by the Act of 1907 were confiscatory, that those fixed by the Act of 1905 were likewise.

5. The parties were producing evidence and preparing their evidence for about one year with the aid of experts on each side. These experts were all men of high character and great proficiency as railroad accountants. The experts on each side were given the fullest opportunity and all the time desired to obtain the information and put the same in form in exhibits, schedules and reports, all of which are in evidence in the cases, supplemented by the oral testimony of each of the experts with reference to all of these things.

6. It was conceded by the experts that the companies fairly, accurately and honestly kept their books showing the facts in these findings set forth. The experts of the state and of the companies have thereby been enabled to present with certainty
242 and precision all the earnings within the state, both state and interstate business. But obtaining and compiling this information by the experts has been at great expense of time and money. One exception to the foregoing is to be noted as to passenger fares for a short period of time after the two cent fare law became operative. By agreement of both sides in open court in June, 1907, this Court issued a temporary writ of injunction against the enforcement of the freight rate statute. The complainants asked for a temporary injunction against the enforcement of the two cent passenger fare statute. This Court held that the statute should be given a trial for five months

and ascertain the result by actual operation. In preparing the order counsel, no doubt by inadvertence, fixed three months as the period for trial as to results. But by acquiescence of both sides, or if not, by delays with which the Court was not chargeable, such status remained for more than one year, and the cases were not actually brought on for trial until in November, 1908. But after the statute became operative in June, 1907, and this Court denied the temporary writ of injunction, the interstate passenger rates remained as they were for a period of about two months. During the time that condition prevailed parties both coming into and going out of Missouri on interstate journeys would buy tickets to the state line, thereby obtaining the benefit of the two cent fare for all distance within the state. It was not possible for the companies to show the truth as to the number of such trips, and therefore it is not possible for the Court to find just how much of the earnings were on account of such interstate trips. But the extent, whatever it was, would make an erroneous showing as to state earnings, though favorable to defendants, because such earnings were of an interstate character. But even though for the short time a part of the business was thus carried on so that additional earnings were erroneously placed to the credit of the state, still the results are not changed, for the error was against, and not in favor of, complainants.

Freight earnings, both state and interstate, are made up from earnings of transportation and another item called "miscellaneous freight," composed of switching, demurrage, and storage
243 charges, and track and equipment rentals. Passenger earnings are made up of passenger fares and miscellaneous, the latter covering mail, express, excess baggage, storage, rentals, and possibly some other terminal earnings.

No difference of consequence has arisen between the parties as to the expense of doing the entire business in the state. With reasonable certainty the expenses for doing the freight and passenger, including miscellaneous of each, can be and have been separated.

The earnings are known and fixed and in these findings stated to a certainty. But as to the expenses as between state and interstate business, there has been a controversy and such is the principal controversy in the cases. There is no known fixed or certain rule for determining how this separation of expenses shall be made. The same cannot be made with mathematical certainty. Complainants claim that the division should be made upon the revenue basis; defendants claim that it should be made upon the ton mile basis for freight, and passenger mile basis for passengers, classifying the miscellaneous earnings as and with freight and passenger earnings respectively. By the revenue basis is meant to assign such proportion of the total expense in the state on that class of business as the earnings of that class of state business bears to all the earnings state and interstate from the same class, or, which is the same thing, ascertain what the percentage of all expenses is of all earnings, then multiply that by the state earnings of any class, and thus obtain the sum to be assigned as state expense. The ton mile basis as to freight means the assignment as state freight expenses of any class of business such

proportion of all state expense as the number of ton miles of state freight bears to the total ton miles of all freight hauled within the state. By the passenger mile basis is meant the assignment as state passenger expenses such proportion of all passenger expenses as the number of passengers in state business carried one mile bears to the whole number of passengers state and interstate carried one mile.

244 For reasons stated in an opinion herein filed, the revenue basis has been and is adopted as the only logical basis to use in arriving at a correct conclusion. The one basis or the other as a whole must be adopted. Either side can make a better showing by adopting the one basis in part of the accounting, and the other basis for the other. Neither should be and is allowed to do this. As will presently appear, the state has attempted to do this in making its passenger earnings accounting.

7. Each basis for accounting has some defects, but they are minor and not controlling and do not change the result if the revenue basis is taken.

The expense of doing the state business over interstate is greater for carrying freight by at least fifty per cent., and at least twenty-five per cent. for carrying passengers. Therefore this extra cost must be added to the expenses after they have been ascertained so as to obtain the total expense. If the ton mile basis of division were adopted, the extra cost should also be added. This would require the use of another multiplier sufficient to bring the sum total of the state freight expense equal to that found herein, to actually represent the cost as shown by the evidence. Any apportionment of passenger expense upon the passenger mile basis would be unfair and unjust, although much more favorable to the companies than if made upon the revenue basis.

8. All things considered, the evidence shows the cost of doing the different classes of state business as between state and interstate apportioned upon the revenue basis with added extra cost brings a result in these findings stated, which is fair and representative and just. The Court finds, aside from the revenue basis, that the evidence shows the amount ascertained in each case as the expense and extra cost, is fair and justly represents the expense of doing each class of state business. The extra cost as to each complainant for doing the state business over interstate is more than fifty per cent. in case of freight, and more than twenty-five per cent. in case of passenger. This extra expense as thus found is considerably in

245 excess of these figures and the figures used are adopted as the minimum. The sum total of this extra cost if ascertained according to the ton-mile theory, would not be changed because it is a question of multiplication, and one multiplier or another must be used accordingly as the theory is adopted. The findings herein made on all the evidence represent in dollars the fair cost and expense fixed at a minimum. There has also been considered and found in each case such sum as would equal the diminution of earnings upon the commodities covered by the freight rate statutes of 1905 and

1907 if the rates thus fixed had been charged, as they would have been but for the temporary injunctions herein issued.

9. The evidence shows that each of complainants has regularly paid for many years interest on its bonds. There is no evidence to show that any of the railroad property within the State of Missouri has an undue amount of bonds or is unfairly bonded, and the evidence does not show that any of the bonds provide for interest in any sum greater than such bonds should carry. It does show that most of the bonds are at the lowest rates of interest, and much less than the legal rate allowable in Missouri. In thus referring to interest, the St. Louis & Hannibal, and Kansas City, Clinton & Springfield companies are excepted.

10. After the adoption of the two cent fare statute, there was no substantial increase in travel. For a few weeks there was a small increase largely brought about by interstate passengers buying tickets to state lines, and in part by the novelty. What if any increase of travel occurred by reason of said two cent fare, would be a mere approximation. It has not been substantial, and there is no reason to believe that any such increase will be brought about in the future by a two cent fare.

11. The values of the railroad properties in the State of Missouri are found, in the cases tried, to be as follows:

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	Miles.	Value.	Value per mile.
St. Louis & San Francisco.	1,688.89	$61,238,414.70	$36,259.00
Atchison, Topeka & Santa Fe	348.31	15,091,212.00	43,326.00
Chicago, Rock Island & Pacific	515.48	19,102,507.59	37,058.00
Kansas City Southern.....	174.48	8,039,084.40	46,075.00
St. Louis & Hannibal.....	120.61	1,143,077.02	9,477.00
Missouri, Kansas & Texas..	506.21	20,894,229.93	41,276.00
Chicago, Burlington & Quincy	1,136.34	53,172,907.83	46,793.00
Kan. City, Clinton & Spring-f'd	151.01	2,380,222.48	15,762.00
Chicago Great Western...	84.43	3,605,236.38	42,701.00

With the exceptions hereinafter stated, the above valuations of the properties of said nine companies as fixed, are in fact practically the same as those fixed by the state assessing board for the purpose of taxation. But aside and apart from the valuations thus fixed by the state board, these findings are that upon the whole evidence said properties are at least of the values above fixed. The evidence shows that included in such sums the state board after making certain valuations under the heading of "all other property" fixed certain valuations, which when added give the totals as above. In argument it was contended that "all other property" included franchise values. This is not deemed important because it is difficult to see wherein steam railroad property like those involved,

can have a franchise value. But waiving that, any franchise value that the state board could have considered, was necessarily so small a per cent. of the total valuations fixed by the state board as to make no appreciable difference in the result of these cases, because if altogether admitted the remaining value is such that no road could obtain a return to which it is herein found to be entitled. But if the property has a franchise value for taxation, it also has such valuation as an earning power, or, rather, upon which returns should be made. In fixing the valuations above set forth there have been considered the immense terminal values of most of the roads,
247 the amount of stock and bonds outstanding, what it would cost to duplicate the properties both with and without terminals in the large cities, and all the evidence bearing on present values, and in fixing said valuations the sums found are the minimum valuations, the properties being worth at least the sums thus fixed.

The foregoing valuations are the same as fixed by the state assessing board except as to the property of the St. Louis & Hannibal and of the Kansas City, Clinton & Springfield in the state, which are found to be worth sixty-six and two-thirds per cent. of the valuations of the state boards.

12. The interest obligations except as already stated are just and reasonable and should be paid in full with some dividends to the stockholders in addition. However, and entirely aside from the question of interest, the rates and earnings should in any event be such as to produce a fair return upon the valuations hereinbefore fixed.

And such earnings should be on the property within the state as would be equivalent to six per centum per annum, that per cent. being a fair return upon such valuations.

13. About the same time the two cent fare statute became operative, passes and other forms of reduced and free transportation, were abolished. Since that time they have not been given nor used except in cases of employés actually employed. The passenger earnings were thereby increased, but such increase was not more than approximately one per cent.

14. After the arguments were concluded at the request of the Court, and with the consent of the parties, two experts upon each side, two selected by the railways and two by the defendants, worked with the Court for something more than one week. These experts were the same gentlemen representing their respective sides who had done much of the work in preparing the cases for the respective sides for hearing. The Court requested these experts to take the numerous tables and tabulate them already in evidence and to confine themselves wholly to that which had been introduced in evidence in the cases, and to make therefrom a new table for each of the
248 nine cases showing the earnings and the expenses chargeable to each class of earnings according to the respective theories covered by counsel in the arguments. The Court further requested said four experts after preparing said new tables that if they agreed, to affix their signatures thereto. This they did below a certificate re-

citing that the statement of earnings, operating expenses, etc., as to each particular road for the time therein given, correctly shows the results on the various assumptions set forth therein. Said nine statements were by order of this Court, February 20, 1909, ordered filed and made of record in the cases. The said nine statements are now and here referred to, and are made part hereof. Each of said nine statements is found by the Court to be correct upon the respective theories presented. But the theory entitled as the "state's basis" is rejected for the reason that said statement improperly divides miscellaneous earnings, placing an undue proportion to the benefit of the state. And said basis improperly makes a division of expense upon the ton mile and passenger mile basis and does not allow a sufficient amount as extra cost of doing state business, and the same does not allow enough for the value of the property in that it deducts all sums included "all other property" multiplied by three.

If the companies had been permitted to charge the amounts per passenger per mile which they did charge and receive prior to the two cent passenger fare statute, they would have received in addition to that which they did receive by reason of the statute and by reason of the temporary injunction being denied for earnings within the state for a period of twelve months last preceding the submission of the cases, the following sums: (Interstate, however, not controlled by statute, but by changed conditions.)

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Name of road.	State passengers.	Interstate passengers.
St. L. & S. F. R. R.	$666,008.72	$509,730.63
A. T. & S. F. R. R.	30,885.52	66,271.03
C. R. I. & P. Ry. and St. L. K. C. & C. Ry.	124,469.14	111,178.60
K. C. So. Ry.	7,044.49	27,260.75
St. L. & H. Ry.	37,275.38	145.23
M. K. & T. Ry.	140,593.46	63,815.12
K. C. C. & S. Ry.	14,654.57	10,846.91
C. B. & Q. R. R.	394,878.77	261,556.41
C. G. W. Ry.	49,459.47	34,621.62

In the case of the St. Louis & San Francisco there were included in expenses sums paid as rentals under a lease given by the Kansas City, Fort Scott & Memphis Railway Company whose common stock is owned by it which operates the company under a lease requiring it to pay to the holders of preferred stock of the Fort Scott & Memphis Company, as a rental, a sum equal to four per cent annual dividends. This lease has been in force several years and is a fair one, and such rental has been treated as an operating expense, and is not included in fixed charges. And the court finds that it is an operating expense. But even if it were a fixed charge, it is not material as the result would not be changed even though the rentals were carried into the fixed charge account. This is so because the amounts carried into state freight expense *is* only $8,428.56 and interstate passenger expense, $7,443.68.

15. In the statements hereinbefore referred to made and signed by the four experts, while they correctly set forth the figures on both the revenue theory and the ton and passenger mile theory the placing of the miscellaneous earnings of the passenger business is arbitrarily fixed and does not at all proceed upon the passenger mile basis, but for that the revenue basis is taken and fixed. Such earnings are arbitrarily divided without reference to the facts, the result being the state earnings and especially passenger, are fixed much higher than the actual earnings. Said division instead of
250 following defendants' theory of the ton mile and passenger mile basis, is upon the revenue basis from which it is seen that this would be a splitting of theories. But from this and from all the evidence it is plain that even the ton and passenger mile basis theory cannot be worked out without showing a loss, to prevent which an arbitrary change of account must be made as to the miscellaneous business. Even in making this arbitrary change the revenue basis is used, and yet the revenue division of expenses insisted upon by complainants is said not to be recognized. This is utterly illogical and unfair, and does not represent the true facts as to whether such earnings are made at a loss, and there is no reliance whatever to be placed in such method of accounting. In so finding no reflection whatever is made upon the experts for the state because as before found they are men of the highest character and learning and highly skilled in accounting and with a proper basis for such accounting their work is perfect. And from their own statements upon the basis adopted herein for making such accounting by the Court, the freight business for the period mentioned would have been done at a loss if the statutory rates had been observed, and the passenger business was done at a loss under the two cent fare statute.

16. As to each of the nine companies whose cases have been submitted, the earnings and expenses and all other items are different in amount. So with the returns upon value to which the company is entitled. But in no event in any of the cases tried would the freight earnings, after making the deductions herein found result in a return to any company of more than three per cent. With nearly every company an actual deficit is shown if the 1907 statute had been in force. So under the two cent fare statute a deficit as to nearly all of the companies, and not more than two per cent. in case of any company. If the freight and passenger business should be combined with the miscellaneous of each class, there would be a deficit as to some and not to exceed three per cent. as to any of the others. In arriving at these conclusions and in adopting the tabulations herein set forth an account has been taken of all earnings, state and interstate, freight and passenger, and miscellaneous; the proportion which state and
251 interstate freight and passenger exclusive of miscellaneous bear to all state and interstate, miscellaneous included, and that which they bear to all the earnings of the state, of miscellaneous freight and miscellaneous passenger earnings, undivided as between state and interstate, with the proportion they are of all earnings, freight and passenger; of all expenses divided as between all kinds of freight and passenger business, including miscellaneous, but

not divided as between state and interstate; of the deductions to be made from all state freights not including miscellaneous of such proportion of expenses of all freight and passenger respectively as the freight and passenger earnings exclusive of miscellaneous bear to all earnings; of the deduction of the extra cost; of the diminution of freight earnings if the freight rate statute had been observed; of the value of that portion of the property assignable to the particular traffic. This value is found by taking for each class of business of the entire value of the property in the state, such proportion as the earnings on that portion of the business bear to all the earnings in the state. A statement so made as to each of the companies whose cases have been submitted is as follows:

17. The periods taken are representative taken by the experts upon both sides, and were for the months set forth in the column headed "time." These tables do not follow the form taken by the experts in preparing exhibits to be introduced in evidence, nor do they follow the prepared form adopted by the four experts in making the nine statements hereinbefore referred to. An attempt has been made to abbreviate, but with the results the same as adopted by the experts. These are found to be correct as now to be set forth, and are adopted by the Court. If any error has crept into them, the Court will make proper correction upon his attention being called thereto after these findings have been filed, which can be readily done upon motion or suggestion. The tables adopted by the court now follow:

252 *Interstate Freight.*

Company.	Time Mo.	Amount.	% of all freight.	% of all earnings.
St. L. & S. F. R. R....	3	$2,214,002.82	76.94	54.68
A. T. & S. F. R. R....	6	1,872,915.00	90.05	67.72
C. R. I. & P. Ry.....	3	665,228.16	79.38	59.86
K. C. So. Ry.....	6	702,249.91	79.35	67.11
St. L. & H. Ry.....	12	51,735.05	36.25	24.61
M. K. & T. Ry.....	6	1,333,455.26	81.73	57.89
C. B. & Q. R. R.....	12	6,454,699.87	78.75	52.40
K. C. C. & S. Ry.....	12	116,893.60	68.27	41.04
C. G. W. Ry.....	6	224,169.58	86.02	57.39

State Freight.

Company.	Amount.	% of all freight.	% of all earnings.
St. L. & S. F. R. R.....	$577,192.84	20.04	14.26
A. T. & S. F. R. R.....	141,133.00	6.79	5.10
C. R. I. & P. Ry.....	150,953.68	18.02	13.58
K. C. So. Ry.....	38,748.76	4.38	3.70
St. L. & H. Ry.....	87,941.99	61.62	41.84
M. K. & T. R. R.....	277,416.52	17.01	12.04
C. B. & Q. R. R.....	1,580,529.64	19.28	12.83
K. C. C. & S. Ry.....	45,003.15	26.29	15.80
C. G. W. Ry.....	29,129.36	11.18	7.45

Miscellaneous Freight.

Company.	Amount.	% of all freight.	% of all earnings.
St. L. & S. F. R. R.	$86,814.57	3.02	2.14
A. T. & S. F. R. R.	65,833.56	3.16	2.38
C. R. I. & P. Ry.	21,815.70	2.60	1.96
K. C. So. Ry.	144,046.62	16.27	13.77
St. L. & H. Ry.	3,044.11	2.13	1.45
M. K. & T. Ry.	20,603.37	1.26	0.89
C. B. & Q. Ry.	161,579.41	1.97	1.31
K. C. C. & S. Ry.	9,319.58	5.44	3.27
C. G. W. Ry.	7,280.24	2.80	1.86

253 *Interstate Passenger.*

Company.	Amount	% of all passenger.	% of all earnings.
St. L. & S. F. R. R.	$368,687.43	31.49	9.11
A. T. & S. F. R. R.	355,318.12	51.81	12.85
C. R. I. & P. Ry.	113,524.21	41.53	10.22
K. C. So. Ry.	89,504.58	55.47	8.55
St. L. & H. Ry.	198.19	0.29	0.09
M. K. & T. R. R.	303,214.54	45.12	13.16
C. B. & Q. Ry.	1,777,788.27	43.15	14.43
K. C. C. & S. Ry.	41,140.00	36.22	14.45
C. G. W. Ry.	72,360.87	55.62	18.53

State Passenger.

Company.	Amount.	% of all passenger	% of all earnings.
St. L. & S. F. R. R.	$599,061.59	51.17	14.79
A. T. & S. F. R. R.	104,370.19	15.22	3.77
C. R. I. & P. Ry.	114,853.04	42.02	10.33
K. C. So. Ry.	31,865.28	19.75	3.05
St. L. & H. Ry.	52,667.38	78.04	25.05
M. K. & T. R. R.	246,368.53	36.66	10.70
C. B. & Q. R. R.	1,611,702.92	39.11	13.09
K. C. C. & S. Ry.	47,646.80	41.95	16.73
C. G. W. Ry.	38,105.03	29.28	9.75

Miscellaneous Passenger.

Company.	Amount.	% of all passenger	% of all earnings
St. L. & S. F. R. R.	$203,077.28	17.34	5.02
A. T. & S. F. R. R.	226,080.00	32.97	8.18
C. R. I. & P. Ry.	44,980.08	16.45	4.05
K. C. So. Ry.	39,973.54	24.78	3.82
St. L. & H. Ry.	14,619.99	21.67	6.96
M. K. & T. Ry.	122,458.22	18.22	5.32
C. B. & Q. R. R.	731,021.89	17.74	5.94
K. C. C. & S. Ry.	24,797.39	21.83	8.71
C. G. W. Ry.	19,643.99	15.10	5.02

254 18. All freight and Passenger Expenses, including Miscellaneous, less taxes and rentals, and percentages to earnings, undivided as between State and Interstate.

Company.	Freight.	Passenger.	Taxes and rentals, freight.	Taxes and rentals, passengers.
St. L. & S. F. R.	1,802,813.26	974,816.61	112,452.04	38,979.63
A. T. & S. F.	1,382,738.65	572,167.20	32,361.50	10,854.04
C. R. I. & P.	619,199.73	317,633.62	74,227.43	21,015.44
K. C. So.	571,297.54	141,432.56	22,331.70	3,737.37
St. L. & H.	117,908.81	68,343.04	5,994.07	2,273.61
M. K. & T.	1,010,643.65	516,589.98	119,017.87	58,465.49
C. B. & Q.	6,793,610.60	3,527,311.81	12,235.30cr.	6,152.58cr.
K. C. C. & S.	98,988.29	138,384.77	9,182.36	5,749.38
C. G. W.	198,887.69	126,355.88	12,294.18	11,312.16

Company.	% of said expenses to earnings, exclusive of taxes and rentals.		Same, including taxes and rentals.	
	Freight.	Passenger.	Freight.	Passenger
St. L. & S. F. R. R...	62.64	83.26	3.91	3.33
A. T. & S. F. R. R....	66.48	83.43	1.55	1.58
C. R. I. & P. Ry.....	73.89	116.20	8.86	7.68
K. C. So. Ry.....	64.55	87.66	2.52	2.31
St. L. & H. Ry.....	82.61	101.27	4.19	3.37
M. K. & T. Ry.....	61.95	76.87	7.29	8.69
C. B. & Q. Ry.....	82.88	85.60	0.00	0.00
K. C. C. & S. Ry.....	57.81	121.83	5.36	5.06
C. G. W. Ry.....	76.33	97.11	4.71	8.68

The time of the foregoing tables is the same as in first table above.

19. The following nine tables show the state earnings and expenses, valuation, return on value, and interest charge of the said nine roads respectively whose cases have been submitted. The other cases are to be covered by decrees by agreement the same as certain decrees of the nine cases, all of which is of record.

255 St. Louis & San Francisco Railroad Company.

Period, Three Months.

State earnings and expenses.	Freight.		Passenger.	
State earnings	577,192.84		599,051.59	
State expenses	361,644.33		498,716.20	
Leaving.....	215,548.51		100,335.39	
Less taxes and rentals...	22,760.29		20,097.90	
Leaving.....	192,788.22		80,237.49	
Extra cost of doing state business, freight 50%, passenger 25%	131,425.08		53,907.36	
Leaving.....	61,363.14		26,330.13	
Diminution in earnings if the state rates in question had been charged.	11,389.27		.....	
Leaving.....	49,973.87		26,330.13	
Valuation		14.26%		14.79%
Assignable proportion of value for representative period, and 6% interest thereon, is	130,988.97		135,857.42	

Return on value:				
(a) Actual return upon the assignable value found in subdivision above, the amount shown in first subdivision above is	.....	2.29%	.....	1.16%
(b) Same without allowance for extra cost.	.....	8.2%	.....	3.5%
Interest charge:				
Actual interest charge paid on assignable properties	116,792.45		121,133.27	

256 Atchison, Topeka & Santa Fe Railway Company.

Period, Six months.

State earnings and expenses.	Freight.		Passenger.	
State earnings	141,133.00		104,370.19	
State expenses	92,581.89		87,834.09	
Leaving.....	48,551.11		16,536.10	
Less taxes and rentals...	3,503.41		901.74	
Leaving.....	45,047.70		15,634.36	
Extra cost of doing state business, freight 50%, passenger 25%	41,859.55		17,947.71	
Leaving.....	3,188.15		2,313.35	(red ink) (deficit)
Diminution in earnings if the state rates in question had been charged.....	13,885.87		.....	
Leaving.....	10,697.72	(red ink) (deficit)	2,313.35	(red ink) (deficit)
Valuation:				
Assignable proportion of value for representative period, and 6% interest thereon	23,089.35	5.10%	17,068.16	3.77%

Return on value:				
(a) Actual return upon the assignable value found in subdivision above, the amount shown in first subdivision above is	.....	nothing	.....	nothing
(b) Same without allowance for extra cost.	.....	8.%	.....	5.49%
Interest charge:				
Actual interest charge paid on assignable properties	17,934.56		13,257.51	

257 The Chicago, Rock Island & Pacific Railway Company.

Period, Three Months.

State earnings and expenses.	Freight.		Passenger.	
State earnings	150,953.68		114,853.04	
State expenses	111,579.80		133,469.65	
Leaving.....	39,373.88		18,616.61	(red ink) (deficit)
Less taxes and rentals...	13,375.78		8,830.68	
Leaving.....	25,998.10		27,447.29	(red ink) (deficit)
Extra cost of doing state business, freight 50%, passenger 25%	41,919.82		17,501.61	
Leaving.....	15,921.72	(red ink) (deficit)	44,948.90	(red ink) (deficit)
Diminution in earnings if the state rates in question had been charged.	9,989.43		.....	
Leaving.....	25,911.15	(red ink) (deficit)	44,948.90	(red ink) (deficit)
Valuation:				
Assignable proportion of value for representative period, and 6% interest thereon	38,911.81	13.58%	29,599.34	10.33%

Return on value:				
(a) Actual return upon the assignable value found in subdivision above, the amount shown in first subdivision above is	..... nothing		..... nothing	
(b) Same without allowance for extra cost.	..... 2.47%		..... nothing	
Interest charge:				
Actual interest charge paid on assignable properties	24,907.02		18,946.21	

258 The Kansas City Southern Railway Company.

Period, Six Months.

State earnings and expenses.	Freight.		Passenger.	
State earnings	38,748.76		31,865.28	
State expenses	25,022.83		27,932.93	
Leaving.....	13,725.93		3,932.35	
Less taxes and rentals...	978.13		738.13	
Leaving.....	12,747.80		3,194.22	
Extra cost of doing state business, freight 50%, passenger 25%	11,711.60		5,346.15	
Leaving.....	1,036.20		2,151.95	(red ink) (deficit)
Diminution in earnings if the state rates in question had been charged.	2,957.58		.....	
Leaving.....	1,921.38	(red ink) (deficit)	2,151.93	(red ink) (deficit)
Valuation:				
Assignable proportion of value for representative period, and 6% interest thereon	8,923.38	3.70%	7,355.76	3.05%

Return on value:				
(*a*) Actual return upon the assignable value found in subdivision above, the amount shown in first subdivision above is.....	.....	nothing	.....	nothing
(*b*) Same without allowance for extra cost.	.....6.58%		.....	2.6%
Interest charge:				
Actual interest charge paid on assignable properties	5,295.38		4,365.11	

259 The St. Louis & Hannibal Railway Company.

Period, Twelve Months.

State earnings and expenses.	Freight.		Passenger.	
State earnings	87,941.99		52,667.38	
State expenses	72,655.40		53,334.91	
Leaving.....	15,286.59		667.53	(red ink) (deficit)
Less taxes and rentals...	3,693.55		1,774.32	
Leaving.....	11,593.04		2,441.85	(red ink) (deficit)
Extra cost of doing state business, freight 50%, passenger 25%	12,026.69		2,444.68	
Leaving.....	433.65	(red ink) (deficit)	4,886.53	(red ink) (deficit)
Diminution in earnings if the state rates in question had been charged.	15,126.02		.....	
Leaving.....	15,559.67	(red ink) (deficit)	4,886.53	(red ink) (deficit)
Valuation:				
Assignable proportion of value for representative period, and 6% interest thereon	28,694.05	41.84%	17,179.40	25.05%

Return on value:				
(a) Actual return upon the assignable value found in subdivision above, the amount shown in the first subdivision above is	..... nothing		..... nothing	
(b) Same without allowance for extra cost.	..... nothing		..... nothing	
Interest charge:				
Actual interest charge paid on assignable property	16,359.44		9,794.55	

260 Missouri, Kansas & Texas Railway Company.

Period, Six Months.

State earnings and expenses.	Freight.		Passenger.	
State earnings.....	277,416.52		246,368.53	
State expenses.....	171,910.48		189,381.89	
Leaving.....	105,506.04		56,986.64	
Less taxes and rentals...	20,244.94		21,433.45	
Leaving.....	85,261.10		35,553.19	
Extra cost of doing state business, freight 50%, passenger 25%.....	66,096.09		27,482.59	
Leaving.....	19,165.01		8,070.60	
Diminution in earnings if the state rates in question had been charged.	20,222.85		.....	
Leaving	1,057.84	(red ink) (deficit)	8,070.60	
Valuation:				
Assignable proportion of value for representative period, and 6% interest thereon	75,469.96	13.04%	67,070.48	10.70%
Return on value:				
(a) Actual return upon the assignable value found in subdivision above, the amount shown in first subdivision above is	..... nothing		.....	0.72%

(*b*) Same without allowance for extra cost.	.....	5.18%	.....	3.18%
Interest charge:				
Actual interest charge paid on assignable property	62,439.68		55,490.41	

261 Chicago, Burlington & Quincy Railroad Company.

Period, Twelve Months.

State earnings and expenses.	Freight.		Passenger.	
State earnings	1,580,529.64		1,611,702.92	
State expenses	1,324,453.83		1,489,746.71	
Leaving.....	256,075.81		121,956.21	
Less taxes and rentals..	2,487.99	cr.	2,798.50	cr.
Leaving.....	258,563.80		124,754.71	
Extra cost of doing state business, freight 50%, passenger 25%	484,129.29		158,205.70	
Leaving.....	225,565.49	(red ink) (deficit)	33,450.99	(red ink) (deficit)
Diminution in earnings if the state rates in question had been charged	112,533.71		.....	
Leaving.....	338,099.20	(red ink) (deficit)	33,450.99	(red ink) (deficit)
Valuation:				
Assignable proportion of value for representative period, and 6% interest thereon	409,325.04	12.83%	417,620.02	13.09%
Return on value:				
(*a*) Actual return upon the assignable value found in subdivision above, the amount shown in the first subdivision above is	.....	nothing	.....	nothing
(*b*) Same without allowance for extra cost.	.....	2.11%	.....	1.79%
Interest charge:				
Actual interest charge paid on assignable property	132,735.02		135,424.89	

262 Kansas City, Clinton & Springfield Railroad Company.

For Period of Twelve Months.

State earnings and expenses.	Freight.		Passenger.	
State earnings	45,003.15		47,646.80	
State expenses	26,024.02		58,052.41	
Leaving	18,979.13		10,405.61	(red ink) (deficit)
Less taxes and rentals	2,414.04		2,411.86	
Leaving	16,565.09		12,817.47	(red ink) (deficit)
Extra cost of doing state business, freight 50%, passenger 25%	8,483.30		7,625.00	
Leaving	8,081.79		20,442.47	(red ink) (deficit)
Diminution in earnings if the state rates in question had been charged.	2,970.21		.....	
Leaving	5,111.58		20,442.47	(red ink) (deficit)
Valuation:				
Assignable proportion of value for representative period, and 6% interest thereon	22,564.51	15.80%	23,892.67	16.73%
Return on value:				
(a) Actual return upon the assignable value found in subdivision above, the amount shown in the first subdivision above is	.....	1.36%	.....	nothing
(b) Same without allowance for extra cost.	.....	3.61%	.....	nothing
Interest charge:				
Actual interest charge paid on assignable property	23,881.78		25,288.48	

263 Chicago Great Western Railway Company.

Period, Six Months.

State earnings and expenses.	Freight.		Passenger.	
State earnings	29,129.36		38,105.03	
State expenses	22,235.64		36,996.98	
Leaving.....	6,893.72		1,108.05	
Less taxes and rentals...	1,374.49		3,312.25	
Leaving.....	5,519.23		2,204.20	(red ink) (deficit)
Extra cost of doing state business, freight 50%, passenger 25%	9,347.72		6,090.35	
Leaving.....	3,828.49	(red ink) (deficit)	8,294.55	(red ink) (deficit)
Diminution in earnings if the state rates in question had been charged.	1,893.41		.....	
Leaving.....	5,721.90	(red ink) (deficit)	8,294.55	(red ink) (deficit)
Valuation:				
Assignable proportion of value for representative period, and 6% interest thereon	8,057.70	7.45%	10,545.32	9.75%
Return on value:				
(a) Actual return upon the assignable value found in subdivision above, the amount shown in the first subdivision above is	.....	nothing	.....	nothing
(b) Same without allowance for extra cost.	.....	2.69%	.....	nothing
Interest charge:				
Actual interest charge paid on assignable property	7,164.08		9,375.81	

264 20. The Court believes that the foregoing findings are all that are material and all that are necessary to make. However, if any party believes that any material finding of fact has been omitted, upon application of such party the same will be considered and made if deemed advisable. And likewise if any of the foregoing computations or figures have been erroneously made. But such application to be entertained must be made within thirty days from this date.

And each, all and every of the foregoing are made as the findings of the Court, and are now and here in open court this March 8th, 1909, ordered filed and made of record in said cases and all of them.

SMITH McPHERSON, *Judge.*

265 Afterwards, to-wit, on the 22nd day of March, A. D. 1909, the same being a day of the regular November term of said court, a final decree was filed and entered of record.

Said final decree is in words and figures as follows:

266 In the Circuit Court of the United States, Western District of Missouri, at Kansas City.

No. 3004. Equity.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,

vs.

JOHN A. KNOTT, JOSEPH P. RICE, and FRANK A. WIGHTMAN, Railroad Commissioners of the State of Missouri; Herbert S. Hadley, Attorney General of the State of Missouri; George Rodus, Frank E. Craig and Robert Keith Furniture Company, a corporation; H. R. Oglesby, Railroad Commissioner of the State of Missouri; Joseph M. Patterson, Charles E. Moss, and George Dodd, County Judges, and Arthur C. Warner, County Treasurer; Julius J. Lang, and Charles A. Kirtley; and Elliott W. Major, Attorney General of the State of Missouri, Respondents.

Final Decree.

The above entitled case this March 8th, 1909, comes on for final decree upon the evidence and stipulations upon file and of record herein, the case having heretofore been fully argued and fully submitted and taken under advisement. And now at this time the Court being fully advised in the premises, the parties appearing by their respective counsel, for reasons stated in an opinion by the Trial Judge and findings of fact signed and filed herein, orders, adjudges and decrees:

1. The maximum freight rate laws of Missouri, of 1905 and 1907, and the passenger rate law of 1907, mentioned in paragraph 2 hereof, and set forth in the original bill and amendments and supplements thereto, are unreasonable and confiscatory; do not afford the com-

plainant any fair or reasonable return upon the value of its property, and to comply therewith would take the property of complainant without due process of law. None of the provisions thereof
266½ should or can be rightfully decreed against complainant, its officers, agents or employés. A finding of fact has been prepared and filed, and is hereby referred to as if made part hereof.

2. Defendants Elliott W. Major, Attorney General of the State of Missouri, John A. Knott, H. R. Oglesby, and Frank A. Wightman, Railroad Commissioners of the State of Missouri, and each of them, their agents, employés and successors, are hereby enjoined from enforcing, or attempting, directly or indirectly, by suit or in any other manner whatsoever, to enforce against complainant, its officers, agents, employés or servants, any of the provisions of, or penalties provided for in the following acts of the legislature of the State of Missouri:

First, an act approved April 14, 1905, entitled:

"An act to amend article IV, chapter 12 of the Revised Statutes of Missouri of 1899, entitled 'Railroad classification, charges, commissioners,' by adding a new section thereto, to be known as section 1195*a*."

Second, an act approved April 15, 1905, entitled:

"An act entitled 'An act to amend chapter 12 of the Revised Statutes of Missouri, Revision of 1899, entitled "Corporations, private," by repealing section 1194 of said Revised Statutes, being part of article IV of said chapter concerning railroad classification, charges, commissioners, and to enact in lieu thereof the following new sections providing for the regulation of freight charges by railroads and the recovery of penalties for the violation thereof.'"

Third, an act approved February 27, 1907, entitled:

"An act to repeal sections 1191 and 1192 of chapter 12, article 4, Revised Statutes of Missouri, 1899, entitled 'Railroad classification, charges, commissioners,' by striking out sections 1191 and 1192 and enacting the following new sections in lieu thereof to be known as sections 1191 and 1192 and 1192*a*."

Fourth, an act approved March 19, 1907, entitled:

"An act to repeal an act of the 43rd general assembly, approved April 15, 1905, entitled 'An act to amend chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled "Corporations, private," by repealing section 1194 of said Revised Statutes, being part of article IV of said chapter, concerning railroad classification, charges, commissioners, and to enact in lieu thereof the following new sections providing for the regulation of freight charges by railroads and the recovery of penalties for the violation thereof; and to repeal an act of the 43rd general assembly, approved April 14, 1905, entitled 'An Act to amend article IV, chapter 12, of the Revised Statutes of Missouri, 1899, entitled "Railroad classification, charges, commissioners," by adding a new section thereto, to be known
267 as section 1195a, fixing the charges for carrying undressed stone, crushed rock and building or paving brick,' and to enact in lieu thereof certain new sections, to be known as sections 1194, 1194*a*-1, 1194*b*-1 and 1194c-1, providing for the regulation of

freight charges by railroads and prescribing the punishment for a violation thereof, which new sections shall read as follows:"

Fifth, an act approved March 19, 1907, entitled:

"An Act to amend article 4, chapter 12, Revised Statutes of Missouri of 1899 by adding a new section thereto, to be known as section 1195*a*, and relating to freight charges and classifications."

3. The other defendants who are officers, and their successors, are likewise enjoined from enforcing or attempting to enforce any of said statutory enactments.

4. There is no evidence that either defendants Rodus, Craig, Robert Keith Furniture Company, Lang, or Kirtley, has threatened or intended to institute any action or proceeding against complainant as averred in the bill of complaint, and the said bill of complaint and the amendments and supplement is upon that ground as to said defendants in this paragraph named, dismissed. If, however, at any future time said defendants or any of them in this paragraph named, should take any action, or threaten or attempt to take any action under either or all of said statutes hereinbefore designated, then and in that case the complainant herein may apply to this Court by supplemental bill or otherwise as it may be advised for further orders in that behalf.

5. It is further ordered, adjudged and decreed that the defendants, or any of them, when the circumstances have changed so that the rates fixed as aforesaid shall yield to complainant reasonable compensation for the services aforesaid, may apply to this Court by supplemental bill or otherwise, as defendants or either of them may be advised, for further orders in their behalf.

And complainants may at any time by supplemental bill or otherwise bring into the case any person, firm or corporation not expressly subject to this decree, who may attempt or threaten to take any action or institute any proceeding against complain-
268 ant under any of said statutes hereinbefore designated, to the end that such orders or supplemental decrees may be entered as the facts and equity may warrant and require.

And the Court retains and reserves unto it jurisdiction over all the parties hereto, and all subjects matter herein not now covered by the pleadings, to the end that such other and further orders and decrees may be made he. er as may become necessary by reason of any changed condition as to the facts, equities or rights that may hereafter take place or arise.

6. The taxable costs of this case including those covered by orders of the Court, heretofore made and hereafter made on motions to tax or retax, and including printing bill of Buxton-Skinner Stationery Company, shall be paid as follows, to-wit:

The one half by complainant and the other half by the defendants to be recovered by execution to be issued by the Clerk of this Court upon application of any party in interest.

Done and ordered of record as of March 8th, 1909, in open court this March 22nd, 1909, at Kansas City, Missouri.

SMITH McPHERSON, *Judge.*

269 Afterwards, to-wit, on the 22nd day of March, 1909, a Motion to Modify Decree was filed. Said Motion is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2988. Equity.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY
vs.
HERBERT S. HADLEY et al.

And Equity Cases No. 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3006.

Motion.

Now comes complainant in each one of the above numbered cases, and separately moves the court to modify and change its opinion and decree in these respects:

1. To strike from the opinion paragraph 4 thereof because it is based upon a misconception, and is an erroneous statement of the law.

2. To strike from paragraph 11 of the opinion these words:

"It being a legislative act, and not a judicial one, this Court can not fix rates. If it could, two and one-half cent passenger rates would be fixed for the stronger roads, and three for the others. But that is for the legislature acting itself with experts, such as the State employed in these cases, or through a Commission with like assistance."

This, for the reason that it was no part of the duty of the court to so decide, and it is directly in conflict with the express findings of fact. At a two and a half cent rate the returns would not be sufficient compensation.

3. To strike from paragraph 11 of the opinion these words:

270 "Each party will pay the costs by such party made, except the compensation of the Master and Stenographer. The half of those will be paid by complainants, and the other half by respondents."

This, for the reason that it is contrary to the rules and principles of law and equity and to good conscience.

4. To modify the decree so far as it taxes any costs against complainant, and to re-tax the same, for that there is no reason in equity or good conscience to tax same against it.

FRANK HAGERMAN,
Solicitor for Complainant.

271 Afterwards, to-wit, on the 3rd day of April, 1909, an Amended Motion to Modify Decree was filed. Said Amended Motion is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2988. Equity.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY
vs.
HERBERT S. HADLEY et al.

And Equity Cases Nos. 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3006.

Amended Motion.

Now comes complainant in each and every one of the above entitled causes, and separately amends the motion heretofore filed to modify and change the opinion and decree in each and every one of the said causes, and thereupon further moves the court:

1. To set aside the said decree as entered March 22, 1909, as of March 8, 1909, so far as concerns those defendants who neither appeared nor demurred, nor adopted the answers of the railroad commissioners and attorney general, of which there are twenty-six in the eighteen cases. This, for the reason that the court erroneously made provisions for and against said defendants when they were not before it, and when complainants actually asked to dismiss as to them, to which, counsel for the said officers in open court consented. It is neither right nor just to enter a decree against persons not in court, nor can the court refuse complainant the right to dismiss as to them.

2. To set aside the portion of said decree dismissing the bill as to appearing and answering shippers, for that upon the findings and opinion, as well as upon the pleadings, the laws mentioned in paragraph 2 of the decree so entered as of March 8th, 1909, are confiscatory and void as to the shippers and passengers, and those classes of persons represented by them. Those of them who de-

272 fended adopted the answer and defense of the state officers. Each complainant is entitled to have the right involved duly established as against them. Because an injunction is found to be unnecessary as to them is no reason for dismissing the bill, and it is inconsistent to enter such dismissal and then attempt to hold jurisdiction against them in the future as if there had been some adjudication as to their rights.

3. To set aside the provision of said decree as to costs for that the attempt in the decree to cure the error already rendered in taxing the costs, is erroneous. In the original opinion the decision was that each party should pay the costs by such party made, except the compensation of the master and stenographer, half of which should be paid by complainants and the other half by defendants. In open court it was announced that such rule was adopted solely because the defendants were state officers and the state might not

appropriate the amount necessary to meet these costs. The supreme court has twice decided this is no excuse and no justification for taxing the costs against the other party. It was conceded by both parties that those shippers who adopted the defense of the state officers and were defended by them ought not to be compelled to pay any additional costs. This concession was agreed to by the court; yet, in the decree as now entered, this concession of both sides and the court is absolutely ignored. The only change made as to the costs is that one-half of all the costs shall be paid by each party. There is no legal excuse or justification to tax any of these costs to complainants; ample money has already been appropriated to the state officers for the purpose of paying the same, and even if it had not been so appropriated, this would have been no reason for making an order that complainant should pay costs.

FRANK HAGERMAN,
Solicitor for Complainants.

273 Afterwards, to-wit, on the 3rd day of April, 1909, a Notice was filed. Said Notice is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General, et al., Defendants.

And Equity Cases Nos. 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004 and 3006.

Notice.

To Herbert S. Hadley, Attorney General, et al., Defendants, and their attorneys of record:

You are hereby notified that complainants will, upon Saturday, April 3rd, 1909, in the federal court room at Kansas City Missouri, call up before the Honorable Smith McPherson, Judge of said court, the motion to modify and change the opinion and decrees in the above entitled causes heretofore filed, copy of which was delivered to defendants, and also the amended motion, copy of which is herewith delivered to you.

FRANK HAGERMAN,
Solicitor for Complainants.

Received copy of above notice and of the motion and amended motion therein referred to this 27th day of March, 1909.

SANFORD B. LADD,
Solicitors for Defendants.

274 Afterwards, to-wit, on the 17th day of April, A. D. 1907, the same being a day of the regular November term of said Court, an amended final decree was filed and entered of record. Said amended final decree is in words and figures as follows:

In the Circuit Court of the United States, Western Division of the Western District of Missouri, at Kansas City.

No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General, et al., Defendants.

Amended Final Decree.

This case heretofore came on for hearing, the parties appearing by counsel, and was submitted upon the motion and amended motion to change and modify the decree of March 8, 1909, and the court being fully advised in the premises, now upon this 17th day of April, 1909, amends the said decree heretofore entered so that same shall read as follows:

The above entitled cause this March 8th, 1909, comes on for final decree upon the evidence and stipulations upon file and of record herein, the case having heretofore been fully argued and fully submitted and taken under advisement. And now at this time the court being fully advised in the premises, the parties appearing by their respective counsel, for reasons stated in an opinion by the trial judge and findings of fact signed and filed herein, orders, adjudges and decrees:

1. The maximum freight laws of Missouri of 1905 and 1907, and the passenger rate law of 1907, mentioned in para-
275 graph 2 hereof, and set forth in the original bill and amendments and supplements thereto, are unreasonable and confiscatory, do not afford the complainant any fair or reasonable return upon the value of its property, and to comply therewith would take the property of complainant without due process of law. None of the provisions thereof should or can be rightfully enforced against complainant, its officers, agents or employés. A finding of fact has been prepared and filed, and is hereby referred to as if made part hereof.

2. Defendants Elliott W. Major, Attorney General of the State of Missouri, John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad Commissioners of the state of Missouri, and each of them, their agents, employés and successors, are hereby enjoined from enforcing, or attempting, directly or indirectly, by suit or in any other manner whatsoever, to enforce against complainant, its officers, agents, employés or servants, any of the provisions of or penalties provided for in the following acts of the legislature of the state of Missouri:

First, an act approved April 14, 1905, entitled:

"An Act to amend article IV, chapter 12 of the Revised Statutes of Missouri of 1899, entitled 'Railroad classification, charged, commissioners,' by adding a new section thereto, to be known as section 1195*a*."

Second, an act approved April 15, 1905, entitled:

"An Act, entitled 'An Act to amend chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled "Corporations, private," by repealing section 1194 of said Revised Statutes, being part of article IV of said chapter concerning railroad classification—charges—commissioners, and to enact in lieu thereof the following new sections providing for the regulation of freight charged by railroads and the recovery of penalties for the violation thereof.'"

Third, an act approved February 27, 1907, entitled:

"An Act to repeal sections 1191 and 1192 of chapter 12, article 4, Revised Statutes of Missouri, 1899, entitled 'Railroad classification—charges—commissioners,' by striking out sections 1191 and 1192 and enacting the following new sections in lieu thereof, to be known as sections 1191 and 1192 and 1192*a*."

Fourth, an act approved March 19, 1907, entitled:

"An act to repeal an act of the 43rd general assembly, ap-
276 proved April 15, 1905, entitled 'An act to amend chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled "Corporations, private," by repealing section 1194 of said Revised Statutes, being part of article IV of said chapter, concerning railroad classification, charges, commissioners, and to enact in lieu thereof the following new sections providing for the regulation of freight charges by railroads, and the recovery of penalties for the violation thereof,' and to repeal an act of the 43rd general assembly, approved April 14, 1905, entitled 'An act to amend Article IV, chapter 12 of the Revised Statutes of Missouri, 1899, entitled "Railroad classifications, charges, commissioners," by adding a new section thereto, to be known as section 1195*a*, fixing the charges for carrying undressed stone, crushed rock and building or paving brick,' and to enact in lieu thereof certain new sections, to be known as sections 1194, 1194*a*-1, 1194*b*-1 and 1194*c*-1, providing for the regulation of freight charges by railroads and prescribing the punishment for a violation thereof, which new sections shall read as follows:"

Fifth, an act approved March 19, 1907, entitled:

"An act to amend article 4, chapter 12, Revised Statutes of Missouri of 1899, by adding a new section thereto, to be known as section 1195*a*, and relating to freight charges and classifications."

3. The other defendants who are officers, and their successors, are likewise enjoined from enforcing or attempting to enforce any of said statutory enactments.

4. There is no evidence that either defendants Robert Keith Furniture Company, Lang or Kirtley, has threatned or intended to institute any action or proceeding against complainant as averred in the bill of complaint, but they have adopted the answers of the Railroad Commissioners and Attorney General. The said bill of complaint

and the amendments and supplement to the extent and so far only as it seeks present injunctive relief against them, is upon that ground as to said defendants in this paragraph named, dismissed without prejudice. If, however, at any future time said defendants or either of them in this paragraph named, should take any action, or threaten or attempt to take any action under either or all of said statutes hereinbefore designated, then and in that case the complainant herein may apply to this court by supplemental bill or otherwise as it may be advised, for further orders in that behalf.

277 5. It is further ordered, adjudged and decreed that the defendants, or any of them, when the circumstances have changed so that the rates fixed as aforesaid shall yield to complainant reasonable compensation for the services aforesaid, may apply to this court by supplemental bill or otherwise, as defendants or either of them may be advised, for further orders in their behalf.

And complainant may at any time by supplemental bill or otherwise bring into the case any person, firm or corporation not expressly subject to this decree, who may attempt or threaten to take any action or institute any proceedings against complainant under any of said statutes hereinbefore designated, to the end that such orders or supplemental decree may be entered as the facts and equity may warrant and require.

And the court retains and reserves unto it, jurisdiction over all the parties hereto, and all subjects matter herein, not now covered by the pleadings, to the end that such other and further orders and decrees may be made hereafter as may become necessary by reason of any changed condition as to the facts, equities or rights that may hereafter take place or arise.

6. The taxable costs of the case including those covered by orders of the court, heretofore made or hereafter made on motion to tax or retax, and including printing bill of Buxton-Skinner Stationery Company shall be paid as follows, to-wit: The one-half by complainant and the other half by defendants who are Railroad Commissioners and the Attorney General, to be recovered by execution to be issued by the clerk of this court upon application of any party in interest.

7. Some of the defendants having announced their intention to appeal, it is now ordered that no appeal shall supersede the injunctive portions of this decree, but pending any such appeal the

278 complainants shall be permitted to charge the rates permitted by sections 1191 and 1192 of the Revised Statutes of Missouri, 1899, the same as if the Passenger Rate Act approved February 27, 1907, and herein held to be confiscatory, had not been passed. Complainant having by order herein of June 17, 1907, been required to temporarily adopt the rate fixed by said Passenger Rate Act, shall be and is hereby permitted, free from the interference of the parties and classes represented by them, who are hereby ordered not to interfere, to restore and put in force the rates authorized by said sections 1191 and 1192, this court reserving power and jurisdiction from time to time to enforce, change and modify this paragraph of this de-

cree, as well as to protect the complainant in being restored to the right of which said order temporarily deprived it.

8. This decree shall be binding upon and enforceable against the said defendants, not dismissed, their assistants, agents, attorneys and employés, and any class or classes of persons or officers represented by them.

9. This cause is without prejudice dismissed as to defendants George Rhodus and Francis E. Craig.

SMITH McPHERSON, *Judge*.

279 Afterwards, to-wit, on the 15th day of March, 1911, Declinations to join in appeal were filed. Said declinations are in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3004.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Complainant,

vs.

JOHN A. KNOTT, H. R. OGLESBY, and FRANK A. WIGHTMAN, Railroad and Warehouse Commissioners; Elliott W. Major, Attorney General of the State of Missouri; Joseph M. Patterson, Charles E. Moss, and George J. Dodd, Judges of the County Court of Jackson County, Missouri; Arthur C. Warner, Treasurer of Jackson County, Missouri; Robert Keith Furniture Company, a Corporation, and Julius H. Lang and Charles A. Kirtley, Defendants.

To Joseph M. Patterson, Charles E. Moss and George J. Dodd, and Hugh C. Gilbert, Edward L. Martin and Edward E. Axline, as successors, respectively, to said Joseph M. Patterson, Charles E. Moss and George J. Dodd, in the offices of judges of the County Court of said Jackson County; Arthur C. Warner, and Overton Gentry, J., as successor to said Arthur C. Warner in the office of Treasurer of said Jackson County; Robert Keith Furniture Company, Julius H. Lang and Charles A. Kirtley:

Each of you is hereby invited to join with the undersigned in a petition for an appeal in the above entitled cause to the Supreme Court of the United States, to reverse the decree in the above entitled cause, rendered on the 8th day of March, 1909, as amended by the decree herein entered on the 17th day of April, 1909, or you will be deemed to have acquiesced in said decree as amended, and we shall present said petition for an appeal and prosecute said appeal without joining you as a party.

280 Said petition for an appeal will be presented to the said Circuit Court for allowance, at the Court room of said court, in Kansas City, Jackson County, Missouri, on Monday, the 6th day

of March, 1911, at 9 o'clock A. M., or as soon thereafter as said petition can be heard.

ELLIOTT W. MAJOR,
Attorney General of the State of Missouri;
JOHN A. KNOTT,
H. R. OGLESBY,
FRANK A. WIGHTMAN,
Railroad and Warehouse Commissioners, Defendants,
By ELLIOTT W. MAJOR,
Attorney General;
JOHN M. ATKINSON,
Assistant Attorney General;
SANFORD B. LADD,
Counsel for said Defendants.

Service of the above is accepted this 4th day of March, 1911, and we, the undersigned, severally decline to join in said petition for an appeal.

Witness- to Signatures:	Signatures.
CALEB S. MONROE.	JOSEPH M. PATTERSON.
CALEB S. MONROE.	CHARLES E. MOSS.
CALEB S. MONROE.	ROBERT KEITH FURNITURE & CARPET CO., JOHN D. HOWE, *Sec'y.*
CALEB S. MONROE.	GEORGE J. DODD.
PORTER B. GODARD.	H. C. GILBERT
PORTER B. GODARD.	E. L. MARTIN.
PORTER B. GODARD.	E. E. AXLINE.
CALEB S. MONROE.	O. H. GENTRY, JR.
CALEB S. MONROE.	ARTHUR C. WARNER, CHARLES A. KIRTLEY, By INGRHAM D. HOOK, *His Attorney in Fact, Duly Authorized Hereto.*

281 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3004.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Complainant,

vs.

JOHN A. KNOTT, H. R. OGLESBY, and FRANK A. WIGHTMAN, Railroad and Warehouse Commissioners; Elliott W. Major, Attorney General of the State of Missouri; Joseph M. Patterson, Charles E. Moss, and George J. Dodd, Judges of the County Court of Jackson County, Missouri; Arthur C. Warner, Treasurer of Jackson County, Missouri; Robert Keith Furniture Company, a Corporation, and Julius H. Lang and Charles A. Kirtley, Defendants.

To Joseph M. Patterson, Charles E. Moss and George J. Dodd, and Hugh C. Gilbert, Edward L. Martin and Edward E. Axline, as successors, respectively, to said Joseph M. Patterson, Charles E. Moss and George J. Dodd, in the offices of judges of the County Court of said Jackson County; Arthur C. Warner, and Overton Gentry, Jr., as successor to said Arthur C. Warner in the office of Treasurer of said Jackson County; Robert Keith Furniture Company, Julius H. Lang and Charles A. Kirtley:

Each of you is hereby invited to join with the undersigned in a petition for an appeal, in the above entitled cause to the Supreme Court of the United States, to reverse the decree in the above entitled cause, rendered on the 8th day of March, 1909, as amended by the decree herein entered on the 17th day of April, 1909, or you will be deemed to have acquiesced in said decree as amended, and we shall present said petition for an appeal and prosecute said appeal without joining you as a party.

282 Said petition for an appeal will be presented to the said Circuit Court for allowance, at the Court room of said court, in Kansas City, Jackson County, Missouri, on Monday, the 6th day of March, 1911, at 9 o'clock A. M., or as soon thereafter as said petition can be heard.

ELLIOTT W. MAJOR,
Attorney General of the State of Missouri;
JOHN A. KNOTT,
H. R. OGLESBY,
FRANK A. WIGHTMAN,
Railroad and Warehouse Commissioners, Defendants.
By ELLIOTT W. MAJOR,
Attorney General;
JOHN M. ATKINSON,
Assistant Attorney General,
SANFORD B. LADD,
Counsel for said Defendants.

Service of the above is accepted this 27th day of February, 1911, and we, the undersigned, severally decline to join in said petition for an appeal.

Witness to Signatures. WALTER S. WILSON.

Signatures. J. H. LANG.

283 Afterwards, to-wit, on the 15th day of March, 1911, defendants' Assignment of Errors was filed. Said assignment of errors is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3004.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Complainant,

vs.

JOHN A. KNOTT, H. R. OGLESBY, and FRANK A. WIGHTMAN, Railroad and Warehouse Commissioners; Elliott W. Major, Attorney General of the State of Missouri; Joseph M. Patterson, Charles E. Moss, and George J. Dodd, Judges of the County Court of Jackson County, Missouri; Arthur C. Warner, Treasurer of Jackson County, Missouri; Robert Keith Furniture Company, a Corporation, and Julius H. Lang and Charles A. Kirtley, Defendants.

Assignment of Errors.

Now come John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad and Warehouse Commissioners, and Elliott W. Major, Attorney General of the State of Missouri, defendants in the above entitled cause, and aver that in the record and proceedings and decree in the above entitled cause, there is manifest error, in this:

1. The court erred in adjudging and decreeing, by its amended decree, that the maximum freight rate laws of Missouri of 1905 and 1907 are unreasonable and confiscatory and do not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the property of complainant without due process of law; because the evidence shows that said laws are reasonable and compensatory, and that they do afford the complainant a fair and reasonable return upon the value of its property; and upon the evidence in the case, the complainant's bill and its amended and supplemental bill, in so far as they sought for any relief against, or brought into question the validity of said maximum freight rate laws, should have been dismissed.

2. The court erred in its amended decree in thereby adjudging and decreeing that the defendant, Elliott W. Major, Attorney General of the State of Missouri, be enjoined from enforcing, or attempting, directly or indirectly, by suit or in any other manner whatsoever, to enforce against the complainant, its officers, agents, em-

ployés or servants, any of the provisions of or penalties provided for in the acts of the Legislature of the State of Missouri, mentioned in said decree, and approved, respectively, April 14, 1905, April 15, 1905, and two approved March 19, 1907.

3. The court erred in its amended decree in thereby adjudging and decreeing that the defendants, John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad Commissioners of the State of Missouri, be enjoined from enforcing, or attempting, directly
284 or indirectly, by suit or in any other manner whatsoever, to enforce against the complainant, its officers, agents, employés or servants, any of the provisions of or penalties provided for in the acts of the Legislature of the State of Missouri, mentioned in said decree, and approved, respectively, April 14, 1905, April 15, 1905, and two approved March 19, 1907.

4. The court erred in decreeing that the maximum freight rate laws of 1905 and 1907 are unreasonable and confiscatory, do not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the property of complainant without due process of law; because the evidence in the case is not sufficient to overcome the presumption in favor of the validity of those laws and the evidence does not establish clearly and beyond all doubt their invalidity.

5. The court erred in decreeing that the freight rate laws of 1905 and 1907 were confiscatory and therefore deprived the complainant of its property without due process of law, because the burden of proof upon that issue was upon the complainant, and that burden was not sustained. The exact gross revenue from intrastate business for any given period was easy of ascertainment. The ascertainment of the expense of earning that revenue was difficult by reason of the fact that interstate and intrastate freight were transported in the same trains and often in the same cars. It was in the power of the complainant, at any time during the litigation, to have determined, by actual observation and investigation for a period which should be typical, the volume of freight, both intrastate and interstate, carried on each of its trains within the State of Missouri during such period, the revenue from each class of freight and also, quite closely, the expense of moving each of said trains within the State, and to have exhibited to the court the result of such observation and investigation. The court would thus have been enabled to determine approximately how much of the total expense of moving said trains should be assigned to the intrastate and interstate freight, respectively, contained in them.

No evidence of this character was adduced, no tests of this kind made. Upon this question the court was left to reach a conclusion upon the opinions of witnesses. No decree should have been rendered for complainant until this evidence of actual facts of vital importance, which was at its command, had been adduced to the court.

6. The court erred in adjudging and decreeing in its amended final decree herein that the maximum freight rate laws of Missouri, of 1905 and 1907, were unreasonable and confiscatory, and did not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the prop-

erty of complainant without due process of law; and that none of the provisions thereof should or can be rightfully enforced against the complainant, its officers, agents, or employés.

Because it appears from the evidence that a very large part of the intrastate freight transported by the complainant is not governed as to the rates to be charged therefor by the Acts of 1905 and the Acts of 1907, but that the maximum rates for the transportation thereof are fixed by the State Board of Railroad and Warehouse Commissioners, by authority of law, conferring upon them that power. It further appears from the evidence, that the complainant has not been charging for the transportation of such freight the rates so fixed by the State Board of Railroad and Warehouse Commissioners, but rates less than those so fixed. But the complainant failed to show and made no effort to show what its
285 revenue from the intrastate freight business would have been had it charged the rates allowed by the State Board of Railroad and Warehouse Commissioners for such portion of the freight carried by it, as was not governed by the Acts of 1905 and 1907; and therefore there is no evidence in the case that if the complainant had charged such rates and had also complied with the Acts of 1905 and 1907, it would not have received a revenue from its intrastate freight business which would have afforded it a fair, adequate and just return for doing such business. If it had charged what it might, according to the law of the State, have charged for the transportation of such freight, its receipts for doing its entire intrastate freight business might, for any evidence which appears in the case, have been sufficient to afford it all the net profits to which it was entitled.

7. The court erred in adjudging and decreeing in the amended final decree that the maximum freight rate laws of Missouri of 1905 and 1907 are unreasonable and confiscatory and do not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the property of complainant without due process of law, because the said acts of 1905 took effect on the 16th day of June, 1905, and the original bill herein, alleging the unconstitutionality of said Acts of 1905, and seeking to enjoin their enforcement, was filed by the complainant on said 16th day of June, 1905, and on the same day a restraining order was issued herein, enjoining the defendants, the Railroad and Warehouse Commissioners, "from taking or making out or printing or delivering any schedule of rates for complainant, containing the maximum rates fixed by said Acts." And on the 12th day of July, 1905, the court continued said restraining order as a temporary injunction, which was in force as against said defendants from said date until the final decree was entered. Therefore, at the time of the filing of said bill and the issue of said restraining order, the defendants, said Railroad and Warehouse Commissioners, because the law had not yet taken effect, had enjoyed no opportunity to revise the then existing schedule of rates.

The said defendants, Railroad and Warehouse Commissioners, had authority, under the law, to fix maximum rates for the transportation

of that portion of the intrastate freight for which rates were not fixed by the Acts of 1905, which said portion was very large in volume and produced to the complainant much the larger part of its entire revenue for the transportation of intrastate freight. The said Railroad and Warehouse Commissioners might, if they had not been prevented by the restraining order and temporary injunction herein, have fixed such rates for the transportation of said portion of such intrastate freight, and made schedules therefor, which schedules should also have embraced the maximum rates for the commodities mentioned in the said Acts of 1905, as would have permitted the complainant, while observing said schedules and said acts of 1905, to have derived from its intrastate freight business, as a whole, a gross revenue sufficient to have yielded to it a fair, just and adequate net return or profit from the doing of its said intrastate freight business. The complainant should have deferred the institution of this suit until the said Board of Railroad and Warehouse Commissioners had fixed rates and adopted schedules so low as to disable the complainant from realizing an adequate revenue upon its entire intrastate freight business.

Therefore, the action was prematurely brought; and for
285½ this reason no restraining order or temporary injunction or final decree should have been rendered as to either of said maximum freight rate Acts.

8. The court erred in adjudging and decreeing by its amended final decree that the passenger rate law of 1907, approved February 27, 1907, is unreasonable and confiscatory and does not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the property of complainant without due process of law; because, upon the evidence in the case, said passenger rate law is reasonable and compensatory and does afford the complainant a fair and reasonble return upon the value of its property; and upon the evidence in the case, the complainant's bill, and its amended and supplemental bills, in so far as they sought for any relief against or brought into question the validity of said passenger rate law of 1907, should have been dismissed.

9. The court erred in decreeing that the passenger rate law of 1907 is unreasonable and confiscatory, does not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the property of complainant without due process of law; because the evidence in the case is not sufficient to overcome the presumption in favor of the validity of the law, and the evidence does not establish clearly and beyond all doubt its invalidity.

10. The court erred in its amended decree in thereby adjudging and decreeing that the defendant, Elliott W. Major, Attorney General of the State of Missouri, be enjoined from enforcing, or attempting, directly or indirectly, by suit or in any other manner whatsoever, to enforce against the complainant, its officers, agents, employés or servants, any of the provisions of or penalties provided for

in said Act of the Legislature of the State of Missouri, mentioned in said decree and approved February 27, 1907.

11. The court erred in its amended decree in thereby adjudging and decreeing that the defendants, John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad Commissioners of the State of Missouri, be enjoined from enforcing, or attempting, directly or indirectly, by suit or in any other manner whatsoever, to enforce against the complainant, its officers, agents, employés or servants, any of the provisions of or penalties provided for in said act of the Legislature of the State of Missouri, mentioned in said decree and approved February 27, 1907.

12. The defendants, John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad and Warehouse Commissioners, for themselves assert that the court erred in that part of its decree whereby it enjoined them from enforcing, or attempting, directly or indirectly, to enforce against the complainant, its officers, agents, employés or servants, any of the provisions of or the penalties provided for in the passenger rate Act, approved February 27, 1907; because, under the laws of the State of Missouri, they have no functions of any kind to perform in relation to rates for the carriage of passengers, nor do such laws vest in them any authority, or devolve upon them any duties to be performed by them, directly or indirectly, to require or compel obedience to any laws relating to rates for the carriage of passengers.

13. The court erred in permitting the complainant, against the objection of the defendants to file herein its alleged amended and supplemental bill of complaint and the amendment thereto, because the original bill was based upon the Acts of the 43rd General
286 Assembly of the State of Missouri, approved April 14, 1905, and April 15, 1905, which fixed maximum rates for intrastate freight, and the alleged amended and supplemental bill and the amendment thereto is based upon the Acts of the 44th General Assembly of the State of Missouri, approved March 19, 1907, which repealed said Acts of 1905 and established a new maximum of rates for intrastate freight, and the Act of the 44th General Assembly of the State of Missouri, approved March 19, 1907, fixing rates for the transportation of fruit, and the Act of the 44th General Assembly of the State of Missouri, approved February 27, 1907, fixing a maximum schedule of rates for passenger traffic, and the matters set forth in the said alleged amended and supplemental bill of complaint and the amendment thereto, are not germane to or supplemental of the original bill of complaint herein.

14. The court erred in permitting the complainant, against the objection of defendants, to file the alleged amended and supplemental bill of complaint and the amendment thereto, so far as the same relates to the Act of the 44th General Assembly of the State of Missouri, approved February 27, 1907, fixing a maximum schedule of passenger rates, because the matters set forth in said alleged amended and supplemental bill, and the amendment thereto, relative to said Act of the 44th General Assembly of the State of Missouri,

fixing a maximum schedule of passenger rates, are not germane to or supplemental of any of the matters alleged in the original bill.

15. The court erred in overruling the demurrer of the defendants to the alleged amended and supplemental bill of complaint and the amendment thereto, because the matters contained in said alleged amended and supplemental bill of complaint and the amendment thereto, are not germane to or supplemental of the original bill, and if they constitute any cause of action whatever, constitute a new, original and independent cause of action not connected with or dependent upon the original cause of action, and one that accrued, if at all, long after the original bill was filed.

16. The court erred in overruling the demurrer of defendants to the portions and paragraphs of the alleged amended and supplemental bill of complaint and the amendment thereto, relative to the Act of the 44th General Assembly of the State of Missouri, fixing a maximum schedule of passenger rates, because such portions and paragraphs of the alleged amended and supplemental bill of complaint and the amendment thereto are not germane to or supplemental of the original bill of complaint, and constitute, if anything, a new and independent cause of action not connected with or dependent upon the original cause of action, and one that accrued, if at all, long after the original bill was filed.

17. The court erred in granting to the complainant the relief asked, with respect to the Act of the 44th General Assembly of the State of Missouri, fixing a maximum schedule of passenger rates, because is was not authorized to take jurisdiction of that matter upon a bill of complaint filed as an amendment or supplement of a bill based upon Acts of the 43rd General Assembly of the State of Missouri, which were confined to freight rates and had been repealed.

18. The court erred in enjoining the defendant, Elliott W. Major, Attorney-General of the State of Missouri, from prosecuting the suits for injunctive relief, instituted by his predecessor in office, Herbert S. Hadley, in the State Court of Missouri, against the complainant prior to the filing of the alleged amended and supplemental bill of complaint herein.

287 19. The court erred in finding that the expense of doing the intrastate business over the interstate is greater for carrying freight by at least fifty per cent. By this language in the finding is meant at least fifty per cent more in proportion to revenue, while upon the weight of credible evidence in the case, the expense of doing the intrastate freight business over the interstate is not greater than thirty per cent per ton per mile.

20. The court erred in finding that the evidence shows that the cost of doing the intrastate freight business, as between intrastate and interstate, apportioned upon the revenue basis with added extra cost, brings a result which is fair, representative or just.

21. The court erred in finding that aside from the revenue basis, the evidence shows that the amount ascertained by the court in any of the cases, as the expense and extra cost of doing the intrastate freight business, is fair or justly represents the expense of doing the intrastate freight business.

The appellants assert, on the contrary, that aside from the revenue basis, there is no evidence in the case from which the result as found by the court as to the expense of doing the intrastate freight business can be reached.

22. The court erred in finding that the proper method of dividing the total expense of doing complainant's freight business in the State and assigning the proper proportion thereof to the intrastate freight business, was by the application of the revenue theory, and in accordance with that theory, dividing the total expense between the two classes of business in proportion to the revenue derived from each and then to the portion thus assigned to the intrastate freight business, adding such an amount as would represent fifty per cent greater expense in proportion to revenue for the intrastate than for the interstate business. The consequence was to burden the intrastate freight business with a portion of the total expense very largely in excess of its just proportion and a much greater share thereof than was actually incurred in doing that business.

The court should have found that the proper method of ascertaining that part of the total State freight expense justly assignable to the intrastate freight, was by determining, as closely as possible, the average cost per ton mile of handling and transporting intrastate and interstate freight, respectively. The average cost per ton per mile deducted from the average revenue per ton per mile (which is easily ascertainable from the evidence) would have produced the net revenue per ton per mile derived from each class of freight. The court erred in its finding which rejected this method, by the application of which the evidence in the case shows that complainant might have complied with the freight rate Acts of 1905 and 1907, and would still have derived from the doing of its intrastate business an adequate profit fully equivalent to any net return to which it is by law entitled.

23. The court erred in finding that the sum total of the extra cost of doing the intrastate freight business would not be changed if ascertained according to the ton mile theory.

On the contrary, the evidence shows clearly that if the expense of doing the intrastate freight business be ascertained by the application of the ton mile theory, that expense would be found to be very much less than the amount found by the court; so much less as to leave to the complainant a reasonable net return for doing the business.

288 24. The court erred in finding that the revenue basis is the proper method of ascertaining the expense of the intrastate passenger traffic. In adopting that method the court divided the total expense of the passenger business done in the State between the intrastate and the interstate business by assigning to each class such a proportion of such total expense as the revenue from each class of business bore to the total revenue from the State passenger traffic, and then adding to the proportion thus ascertained for the intrastate, such an amount as would represent twenty-five per cent greater expense in proportion to revenue for the intrastate than for the interstate business. The result of the application of this method was to

charge the intrastate business with a much larger share of the total expense than was actually incurred in doing that business.

The true method is to ascertain the average revenue and expense of carrying a passenger one mile, in each class of business, and the difference would be the net revenue or deficit on each passenger mile.

The evidence shows that the net revenue per passenger mile is greater in the intrastate than in the interstate business, and that the net revenue from its intrastate passenger business, if charged for at the rates fixed by the Act of February 27, 1907, affords to the complainant a reasonable and adequate return for doing the business.

25. The court erred in finding that the expense of doing the State passenger business over the interstate is at least twenty-five per cent; this language meaning twenty-five per cent more in proportion to revenue. The evidence in the case does not support this finding.

26. The court erred in adopting the tables of earnings and expenses of the complainant, set forth in the finding of facts, because the said tables of expenses and of earnings did not cover any fairly representative period of operations of the complainant, and because said tables of expenses and earnings are not supported by any competent evidence in the case.

27. The court erred in finding that the short line between two competitive points, necessarily fixes the rate. If the rate is thus fixed it is because the complainant and the other railroad companies of the State have agreed with each other that it shall be so fixed.

28. The court erred in finding that it was conceded by the experts that the companies accurately and honestly kept their books, showing the facts set out in the findings of the court. The books of the companies did not show the facts set out in said findings, nor did the experts for the State concede that they did.

29. The court erred in finding (as stated in the opinion), that evidence in the case tended to show that a large number of men have been discharged from the service of the railroad companies by reason of the reduction of the rates. Not a reduction in rates, but a general depression in business and the want of business to keep the men employed, was the cause of their discharge.

30. The court erred in finding that the value of the complainant's franchise, included in the total valuation of its property as fixed by the State Board of Equalization, was so small a per cent of such total valuation as to make no appreciable difference in the result of the case.

On the contrary, the evidence shows that the value of the franchise was a substantial part of such total valuation.

31. The court erred in finding that if the value of complainant's franchise were altogether omitted from the value of its property, it could not have obtained from the operation of its property, or from the doing of the intrastate freight business, the return to which it is entitled.

289 32. The court erred in finding that the complainant was entitled to a return upon the value of its franchise.

Wherefore, these defendants pray that the said amended final decree be reversed, and that said court may be directed to enter a decree

dismissing the complainant's bill, its amended and supplemental bill, and the amendment thereto.

ELLIOTT W. MAJOR,
Attorney General;
JOHN M. ATKINSON,
Assistant Attorney General;
SANFORD B. LADD,
Solicitors for Defendants John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad and Warehouse Commissioners, and Elliott W. Major, Attorney General of the State of Missouri.

290 Afterwards, to wit, on the 15th day of March, 1911, Defendants' Petition for Appeal was filed and entered of record. Said Petition for Appeal is in words and figures as follows:

291 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3004.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
Complainant,
v.
JOHN A. KNOTT, H. R. OGLESBY, and FRANK A. WIGHTMAN, Railroad and Warehouse Commissioners; Elliott W. Major, Attorney General of the State of Missouri; Joseph M. Patterson, Charles E. Moss, and George J. Dodd, Judges of the County Court of Jackson County, Missouri; Arthur C. Warner, Treasurer of Jackson County, Missouri; Robert Keith Furniture Company, a Corporation, and Julius H. Lang and Charles A. Kirtley, Defendants.

The above named defendants, John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad and Warehouse Commissioners, and Elliott W. Major, Attorney General of the State of Missouri, conceiving themselves aggrieved by the decree rendered as of the 8th day of March, A. D. 1909, but signed, filed and entered on the 22nd day of March, A. D. 1909, as amended by the decree entered on the 17th day of April, A. D. 1909, in the above entitled cause do hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and pray that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

And said defendants further show to the court that they have, in writing, notified the other defendants in said cause, to wit: Joseph M. Patterson, Charles E. Moss and George J. Dodd, and Hugh C. Gilbert, Edward L. Martin and Edward E. Axline, as succes-

sors respectively to said Joseph M. Patterson, Charles E. Moss and George J. Dodd in the offices of Judges of the County Court of said Jackson County; Arthur C. Warner and Overton Gentry, Jr., as successor- to said Arthur C. Warner in the office of Treasurer of said Jackson County; Robert Keith Furniture Company, Julius H. Lang and Charles A. Kirtley, of their intention to present this petition for an appeal, and have, in writing, invited said other defendants to join with them in such petition for an appeal, and that all of said other defendants have, in writing, accepted service of said notices and invitations, and have, also in writing, severally declined to join in said petition for an appeal, which said notices and invitations, acceptances and declinations are now presented to the court and filed herewith.

ELLIOTT W. MAJOR,
Attorney General;
JOHN M. ATKINSON,
Assistant Attorney General;
SANFORD B. LADD,
Counsel for John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad and Warehouse Commissioners, and Elliott W. Major, Attorney General of the State of Missouri.

Dated this 15th day of March, A. D. 1911.

The foregoing petition for appeal is allowed Dated March 15th 1911.

(Signed) SMITH McPHERSON, *Judge.*

292 Afterwards, to-wit, on the 15th day of March, 1911, a Bond for Appeal was approved and filed. Said Bond is in words and figures as follows, to-wit:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3004.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
Complainant,
vs.
JOHN A. KNOTT, H. R. OGLESBY, and FRANK A. WIGHTMAN, Railroad and Warehouse Commissioners; Elliott W. Major, Attorney General of the State of Missouri; Joseph M. Patterson, Charles E. Moss, and George J. Dodd, Judges of the County Court of Jackson County, Missouri; Arthur C. Warner, Treasurer of Jackson County, Missouri; Robert Keith Furniture Company, a Corporation, and Julius H. Lang and Charles A. Kirtley, Defendants.

Know all men by these presents: That we, John A. Knott, H. R. Oglesby, Frank A. Wightman and Elliott W. Major, as principals,

and J. W. Perry and W. H. Seeger, as sureties, are held and firmly bound unto Chicago, Milwaukee and St. Paul Railway Company, in the sum of One Thousand Dollars ($1000) to be paid unto the said Chicago, Milwaukee and St. Paul Railway Company, its successors or assigns; to which said payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of March, A. D. 1911.

This obligation is upon this condition:

Whereas, the above named John A. Knott, H. R. Oglesby,
293 — to the Supreme Court of the United States to reverse the decree rendered, and entered in the above entitled cause by the Circuit Court of the United States for the Western Division of the Western District of Missouri;

Now if the above named John A. Knott, H. R. Oglesby, Frank A. Wightman and Elliott W. Major, shall prosecute their said appeal to effect, and answer all costs if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and virtue.

JOHN A. KNOTT. [SEAL.]
H. R. OGLESBY. [SEAL.]
FRANK A. WIGHTMAN. [SEAL.]
J. W. PERRY. [SEAL.]
W. H. SEEGER. [SEAL.]
ELLIOTT W. MAJOR. [SEAL.]

The above bond is hereby approved and ordered to be filed and made a part of the record.

(Signed) SMITH McPHERSON, *Judge.*

294 Afterwards, to-wit, on the 15th day of March, 1911, the following Order Allowing Appeal to defendants was filed and entered of record, to-wit:

295 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3004.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Complainant,

v.

JOHN A. KNOTT, H. R. OGLESBY, and FRANK A. WIGHTMAN, Railroad and Warehouse Commissioners; Elliott W. Major, Attorney General of the State of Missouri; Joseph M. Patterson, Charles E. Moss, and George J. Dodd, Judges of the County Court of Jackson County, Missouri; Arthur C. Warner, Treasurer of Jackson County, Missouri; Robert Keith Furniture Company, a Corporation, and Julius H. Lang and Charles A. Kirtley, Defendants.

Now at this day come the defendants, John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad and Warehouse Com-

missioners, and Elliott W. Major, Attorney General of the State of Missouri, and present their petition for an appeal to the Supreme Court of the United States from the final decree rendered herein, and also present an assignment of errors accompanying said petition, and at the same time make it appear to the satisfaction of the court that they have, in writing, notified the other defendants in this cause, that is to say, Joseph M. Patterson, Charles E. Moss and George J. Dodd, and Hugh C. Gilbert, Edward L. Martin, and Edward E. Axline, as successors respectively to said Joseph M. Patterson, Charles E. Moss and George J. Dodd, in the offices of Judges of the County Court of said Jackson County; Arthur C. Warner and Overton Gentry, Jr., as successor to said Arthur C. Warner in the office of Treasurer of said Jackson County, Robert Keith Furniture Company, Julius H. Lang and Charles A. Kirtley, of their (the said petitioners') intention to present said petition for an appeal, and have, also in writing, invited said other defendants to join with them, the said petitioners, in said petition for an appeal, and that all of said other defendants have, in writing, accepted service of said notices and invitations, and have, also in writing, severally declined to join in said petition for an appeal, which said notices, invitations, acceptances and declinations are now, by said petitioners, presented to the court; and it is thereupon ordered by the court that said petition for an appeal, said assignment of errors, said written notices, invitations, acceptances and declinations be filed and made a part of the record in this cause, and it is further ordered that the interests of the defendants so presenting said petition for an appeal be severed in said appeal from the interests of the said other defendants herein, and upon consideration of said petition, the court now allows the same, and to the said defendants, John A. Knott, H. R. Oglesby, Frank A. Wightman and Elliott W. Major, an appeal to the Supreme Court of the United States from the final decree rendered in this cause in accordance with the prayer of said petition. And at the same time the said defendants present their bond for an appeal in the sum of One Thousand Dollars ($1,000) with J. W. Perry and W. H. Seeger as sureties thereon, which said bond is now approved by the court, and it is ordered that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings herein be transmitted to the said Supreme Court of the United States.

Dated Kansas City, Missouri, March 15th, 1911.

(Signed) SMITH McPHERSON, *Judge.*

296 Afterwards, to-wit, on the 15th day of March, 1911, an assignment of errors was filed. Said assignment of errors is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,

vs.

JOHN A. KNOTT, H. R. OGLESBY and FRANK A. WIGHTMAN, Railroad Commissioners, et al., Defendants.

Assignment of Errors.

Now comes complainant and respectfully shows that the court in the proceedings and decree in the above entitled cause committed manifest error in each of the following respects:

1. In rendering and entering that portion of paragraph 5 of the original and amended decree reading:

"It is further ordered, adjudged and decreed that the defendants, or any of them, when the circumstances have changed so that the rates fixed as aforesaid shall yield to complainant reasonable compensation for the services aforesaid, may apply to this court by supplemental bill or otherwise, as defendants or either of them may be advised, for further orders in their behalf."

2. In rendering and entering paragraph 6 of the amended final decree reading:

"The taxable costs of the case including those covered by orders of the court, heretofore made or hereafter made on motion to
297 tax or retax, and including printing bill of Buxton-Skinner Stationery Company shall be paid as follows, to-wit: The one-half by complainant and the other half by defendants who are Railroad Commissioners and the Attorney General, to be recovered by execution to be issued by the clerk of this court upon application of any party in interest."

3. In not decreeing to be regulation of commerce among the states and invalid, of no force, and contrary to the provisions of section 8, article 1, of the constitution of the United States, each of the acts of the legislature of Missouri mentioned in paragraph 2 of the amended final decree; the purpose of this assignment being to make it a separate assignment of error as to each of said acts, the same as if it were separately written out and applied to each act.

4. In not decreeing that the rights, privileges and immunities of complainant were abridged, that complainant was denied the equal protection of the law and deprived of its property without due process of law, all contrary to the provisions of the fourteenth amendment to the constitution of the United States, by the state making and enforcing each of the legislative acts mentioned in paragraph 2 of the amended final decree; the purpose and intent hereof being to separately assign this error as to each one of said acts the same as if so separately written.

5. In holding that neither the freight act approved March 19, 1907, nor that approved April 14, 1905, nor that approved April 15, 1905, nor the passenger act approved February 27, 1907, nor the enforcement of either of them, directly affected interstate commerce.

6. In holding that neither the freight act approved March 19, 1907, nor that approved April 14, 1905, nor that approved April 15, 1905, nor the passenger act approved February 27, 1907, was discriminatory against complainant, or, as to it, violative of the fourteenth amendment to the constitution of the United States
298 when the act was upon its face general in its terms, applicable to all companies in the state, and the findings show that it is confiscatory as to each of the other companies in the state and as to complainant's competitors.

7. In holding that the passenger act approved February 27, 1907, was upon its face valid, whereas it was discriminatory and unreasonably classified companies according to mileage and according to ownership, control and occupation so that all roads in the state were arbitrarily required to charge two cents per mile, except those of less than forty-five miles in length, which were permitted to charge four cents per mile, provided they were not owned, leased, controlled or occupied by any trunk line, company or corporation.

8. In holding that the passenger act approved February 27, 1907, was on its face valid, when it was discriminatory and unreasonable, and classified the fares to be charged by providing half fare for children.

9. In holding to be valid upon its face the freight act approved April 15, 1905, whereas it was discriminatory and unreasonable in that it fixed rates to be charged by any individual or railway company, owning, operating, managing and leasing a railroad but applied the penalties only to railway companies or corporations.

10. In not decreeing to be void each of the acts of the legislature of Missouri mentioned in paragraph 2 of the amended final decree, for that the penalties were so enormous, unreasonable and severe as to be an attempt to coerce complainant to put them in and prevent it from having a judicial inquiry and review; all contrary to the fourteenth amendment to the constitution of the United States; the purpose being to make this a separate assignment as to each of said acts the same as if they were separately written out and applied thereto.

299 For all of which reasons the decree and holding of the Circuit Court in such regard should be reversed.

FRANK HAGERMAN,
Solicitor for Complainant.

300 And on the 15th day of March, 1911, a petition for cross appeal was filed. Said petition for cross appeal is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,

vs.

JOHN A. KNOTT, H. R. OGLESBY, and FRANK A. WIGHTMAN, Railroad Commissioners, et al., Defendants.

The above named complainant, conceiving itself aggrieved by the decree rendered and entered on March 22, 1909, as of March 8, 1909, as amended by the decree rendered and entered on April 17, 1909, at the November, 1908, term of court in the above entitled cause, does hereby apply for an appeal, and does appeal from such decree to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herewith, and prays that this appeal may be allowed as a cross-appeal, and such steps taken to perfect the same as may be required by law, an appeal having already been prosecuted for the decree, and a transcript taken by the attorney general and railroad and warehouse commissioners, defendants in the cause.

FRANK HAGERMAN,
Solicitor for Complainant.

The foregoing petition for appeal is presented and allowed this March 15th, 1911, by the undersigned, Judge who rendered the decree appealed from.

(Signed) SMITH McPHERSON, *Judge.*

301 Afterwards, to wit, on the 15th day of March, 1911, a bond for cross appeal was approved and filed. Said bond is in words and figures as follows, to-wit:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,

vs.

JOHN A. KNOTT, H. R. OGLESBY, and FRANK A. WIGHTMAN, Railroad Commissioners, et al., Defendants.

Bond.

Know all men by these presents that the Chicago, Milwaukee & St. Paul Railway Company, as principal, and John F. Downing as

surety, are held and firmly bound unto the above named defendants in the full and just sum of two hundred and fifty dollars to be paid to said defendants, their heirs, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators jointly and severally by these presents.

Dated this March 15, 1911.

Whereas lately, at the November, 1908, term of the above named court, in the above entitled cause, a decree was rendered against said complainant, which has obtained a cross appeal to reverse the action of the court in the aforesaid suit and a citation directed to the said defendants citing and admonishing them to be and
302 appear in the Supreme Court of the United States at the city of Washington, District of Columbia, thirty days from and after the date of the said citation.

Now the condition of the above obligation is such that if the said cross appellant and complainant above named shall prosecute said cross appeal to effect, and answer all damages and costs if it fail to make good its appeal, then the above obligation to be void; otherwise to remain in full force and virtue.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Principal*,
By FRANK HAGERMAN,
Agent and Attorney.
JOHN F. DOWNING, *Surety.*

The above bond is hereby approved and ordered to be filed and made a part of the record this March 15th, 1911.

(Signed) SMITH McPHERSON, *Judge.*

303 And on the 15th day of March, 1911, the following order allowing cross appeal was filed and entered of record, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,
vs.
JOHN A. KNOTT, H. R. OGLESBY, and FRANK A. WIGHTMAN, Railroad Commissioners, et al., Defendants.

Order.

This cause coming on for hearing this March 15th, 1911, upon the application for an appeal by the complainant, together with its assignment of errors, an appeal is hereby allowed and bond for appeal is hereby fixed in the sum of two hundred and fifty dollars.

Inasmuch as this is a cross appeal, the clerk is directed to forward a transcript of all proceedings in the cause since the preparation and filing of a transcript of the record in the appeal taken by the defendants.

(Signed) SMITH McPHERSON, *Judge.*

304 Afterwards, to wit, on the 31st day of March, 1911, the following Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

#3004.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Complainant,

vs.

JOHN A. KNOTT et al., Defendants.

For good cause shown, that is, because the Clerk of said Circuit Court is unable to prepare a transcript of the record herein within thirty days from the date of the day of signing the citation herein it is

Ordered that the time for filing said record with the Clerk of the Supreme Court be, and the same is hereby, enlarged; and it is

Ordered that said record may be filed with the clerk of the Supreme Court on or before the first day of August, 1911.

(Signed) SMITH McPHERSON, *Judge.*

Dated Kansas City, Mo., March 31, 1911.

305 Afterwards, to-wit, on the 13th day of April, 1911, a Stipulation was filed. Said Stipulation is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,

v.

JOHN A. KNOTT et al., Defendants.

Whereas, John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad and Warehouse Commissioners, and Elliott W. Major, Attorney General of the State of Missouri, defendants in the above entitled cause, have been allowed an appeal therein to the Supreme Court of the United States.

And, Whereas, the said Chicago, Milwaukee & St. Paul Railway Company, complainant, has been allowed a cross-appeal herein to the Supreme Court of the United States.

And, Whereas, the said Railroad and Warehouse Commissioners and said Attorney General were, by said circuit court, allowed an appeal, and the Chicago, Burlington and Quincy Railroad Company was allowed a cross-appeal to the Supreme Court of the United States from a decree rendered by said circuit court in a cause then pending in said Circuit Court of the United States, wherein said Chicago, Burlington and Quincy Railroad Company was complainant, and said Railroad and Warehouse Commissioners and said Attorney General and others were defendants.

And, Whereas, the evidence offered, taken and received in the said circuit court in the above entitled cause is included in the transcript and printed record in said cause wherein the said Chicago, Burlington and Quincy Railroad Company was complainant.

And, Whereas, all of said evidence was for the purpose of the hearing in said Supreme Court of the United States of the
306 said appeal and cross-appeal in said cause wherein the said Chicago, Burlington and Quincy Railroad Company was complainant, printed, under the direction of the clerk of the Supreme Court of the United States and is contained in five printed volumes now on file in the office of the clerk of said Supreme Court in the causes therein pending, numbered 21821, wherein John A. Knott and others are appellants and the Chicago, Burlington and Quincy Railroad Company is appellee, and numbered 21837, wherein the Chicago, Burlington and Quincy Railroad Company is appellant and John A. Knott and others are appellees.

Now, therefore, in order to save the parties hereto the useless expense which would be incurred in the preparation of a complete transcript of the record and the evidence in the above entitled cause, it is stipulated and agreed between the parties hereto that upon the hearing in the said Supreme Court of the appeal and the cross-appeal in the above entitled cause, the evidence contained in said five printed volumes shall be taken and regarded as the evidence in the above entitled cause with the same effect as if it had been written out and certified in this cause by the clerk of the circuit court, and that the evidence contained in said five printed volumes, supplemented by a transcript of all the pleadings, papers, decrees and orders peculiar to the above entitled cause, shall be taken and regarded in said Supreme Court as a complete transcript of the record and proceedings in the above entitled cause, and that it shall not be necessary for the clerk of the circuit court to include in the transcript prepared by said clerk any evidence contained in said five printed volumes.

ELLIOTT W. MAJOR,
Attorney General, Solicitors for John A. Knott et al., Appellants.

FRANK HAGERMAN,
Solicitor for C., M. & St. P. Ry. Co., Appellee.

FRANK HAGERMAN,
Solicitor for C., M. & St. P. Ry. Co., Cross-Appellant.

ELLIOTT W. MAJOR,
Attorney General, Solicitors for John A. Knott et al., Cross-Appellees.

307 The Opinion filed herein on the 14th day of June, 1907, is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3000.

THE WABASH RAILWAY COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

And Seventeen Other Like Cases.

Remarks of Judge Smith McPherson, at Two O'clock P. M., June 14th, 1907.

Here are 18 cases, in which all the railways of the State ask to file supplemental bills in equity in the 18 cases, brought two years ago against the State officers to enjoin the enforcement of statutes of 1905 fixing rates. The charge was made that the rates were not remunerative but confiscatory, and therefore void by reason of the United States Constitution. Those cases were placed at issue and referred to a master. The evidence has been taken and the court is now advised that within a month or two the cases will be argued to the Master. So that after six months or more from now a final decree will be entered in this court. I do not speak of this delay in a spirit of complaint, or even criticism. I simply state the fact of delay. During the early part of this year the legislature of Missouri repealed part of the rate laws of 1905 complained of, enacted substitutes therefor and placed still other commodities under specific tariff rates, including passenger rates of two cents per mile.

Early in this week notices were given of an application to file supplementary bills, attacking the rates fixed in 1907, on the ground that such rates were confiscatory.

That this is a judicial question all informed people agree. That it is a question of gravity and almost supreme importance all recognize and by none more than by the courts. It involves the question of what are reasonable rates and how determined. It involves the question of whether all the receipts for State business can be taken in their entirety, and if in the aggregate remunerative of whether the laws are valid. And it involves the question as

308 to whether every person is entitled to have his product carried at reasonable rates instead — carrying some at unreasonably low rates and others at unreasonably high rates, and allowing the law to stand because the average is remunerative. And it involves the question of whether the State of Missouri is attempting to exercise the powers solely lodged in the Congress of the United

States. And there may or may not be involved the question of which is the more powerful with reference to these rates, the nation or the state.

I express no opinion as to some of these questions, on some of which I have a conviction and on others I do not even have a tentative opinion. But they are all judicial questions, and for the courts only, and in the end will be decided by the Supreme Court of the United States, a court in which every patriotic person has unbounded confidence. To that Court these questions in the end will go for decision.

As to whether these supplemental bills may be filed was set down for argument this morning at the opening of court. These rate statutes presumptively are valid, and if valid went into effect at midnight last night. Seeing the gravity of the situation, this court on yesterday, on its own motion, on inspecting the proposed supplemental bills, entered a restraining order, restraining the railways from carrying out the recent statute until the matters could be heard, as to filing the supplemental bills on which, if filed, a temporary injunction should issue. At the morning hour of this day, the Assistant Attorney General of the State appeared and stated that the Attorney General could not be here until to-morrow morning. It was also at that time made to appear that on the morning of this day suits were filed in the state courts at St. Louis and Kansas City, and a temporary mandatory injunction had been issued by the state courts, commanding the railways to recognize as valid and carry out the statute of 1907.

All courts, state and federal, recognize the delicacy of real or seeming conflicts between the courts. All courts recognize that all other courts act in good faith. And this court appreciates
309 the situation. It is a question worthy of argument and deliberation.

When the foregoing situation was disclosed this morning counsel for the railways moved for a continuance for a week or ten days, to the end that the situation might be looked into. This motion will be overruled, and all these matters are set down for hearing at two o'clock to-morrow afternoon. These delays cannot be allowed. The interests of the public and the railways alike demand the speedy determination of all questions connected with the foregoing statements as well as all questions connected with the validity or invalidity of the rate statute recently enacted by the state legislature of Missouri. At the time named I shall expect counsel on both sides to be ready to proceed in argument, as well as to move for such other proceedings as may be deemed proper. All of which is so ordered.

310 On the 17th day of June, 1907, an Opinion was filed. Said Opinion is in words and figures as follows:

In the Circuit Court of the United States, Western District of Missouri, at Kansas City.

THE WABASH RAILWAY COMPANY
vs.
HERBERT S. HADLEY, Attorney General, and THE STATE RAILROAD COMMISSIONERS.

And Seventeen Other Like Cases.

Remarks of Judge Smith McPherson, Monday, June 17, 1907.

These cases were argued on Saturday and taken under advisement until this time. The situation is such that I must decide the questions today. Limited as the time has been, I have an abiding conviction of what should be done even if the reasons therefor may not be stated with the fullness that the importance of the matters requires. I have been much aided by the arguments, which were strong, eloquent and powerful, by counsel representing both sides, and as it seems to me, every phase of the questions was so illuminated by the arguments that all possible questions are at an end of debate.

The real question here is, has this court jurisdiction over the passenger fare law of 1907 of the Missouri Legislature by which it is declared that the legal fare be two cents per mile. A question connected with that is, whether the bills tendered are supplemental bills to those filed in the eighteen cases two years ago to enjoin the enforcement of the freight tariff law of 1905 now pending before the Master.

A supplemental bill usually is where there has been some change in the rights or status of the parties which must be carried forward by a supplemental bill. And usually when a supplemental bill is thus allowed, matters can be brought in which could have been covered by an amendment to the original bill. These discussions as to supplemental bills, as well as to other bills, are exceedingly technical. It seems to me that the test is not so much in the way
311 a pleading is styled, as what the allegations of the pleading are. Formerly, discussions as to various bills in equity gave rise to great delay, the results being that years and years would elapse before a chancery case could be concluded. Looking back at those old discussions, it now seems to have been a folly to thus waste the time and energies of the judges and of counsel in determining these technical questions. Such must have been the belief of the Supreme Court when a code of Rules in Equity were established, the purpose no doubt being to get rid of the old technicalities which served no useful purpose. By the adoption of the Rules in Equity, we have a system of fact pleading, covering almost every phase of equity pleading and practice; and it is only when some question of practice is not covered by the rules, that we go back to see what the practice of the High Court of Chancery in England was, and then not as positive rules, but as furnishing just analogies. Rule 90 thus

providing was adopted in the year 1842, and the Supreme Court has decided that when we go to the English Chancery practice, we must take the practice as it existed in England in 1842, when this rule was adopted. By Rule 57 it will be seen that the supplemental bill is allowed when any material event has happened after the filing of the original bill. In 1905 the Legislature of Missouri enacted a maximum freight tariff statute as to several commodities. The railways contested the validity of that statute in the eighteen actions above referred to, and these actions are still pending. By the act of 1907 the Legislature declared that all railways should charge but two cents per mile per passenger. It seems to me that this is an event happening since the institution of the original suits, and an event that is germane to the original controverted questions.

But I do not deem it of much importance to determine whether the pleadings tendered for filing are supplemental bills, or whether they are original bills.

On Tuesday, the 11th inst., the complainants gave notice of filing these bills on Friday, the 14th inst. On Thursday, the 13th
312 inst., the railway companies asked leave to file them. Solely out of courtesy to the Attorney General, who was not then present, this was refused, but the Court on its own motion issued restraining orders to keep the matters in status quo. At the time fixed, Friday the 14th inst., the matter was again delayed for a day at the request of the Attorney General, he still being absent. And on that day bills were filed in the state courts at Saint Louis and Kansas City, the purpose being, as it is said, to bring about the enforcement of this statute in question. And the argument now is, that as these cases were filed in the state courts on Friday the 14th inst., the day before the arguments were had in this court, that the same subject matter was pending in the state courts, and that the state courts would take jurisdiction to the exclusion of this court, the cases being there first pending. But the above statement of facts shows that the cases were pending in this court from Tuesday the 11th inst. and that orders were made on Thursday the 13th inst., the day before the cases were lodged in the state courts. If these matters could not be covered by supplemental, they could be covered by original bills, and they were presented prior to the institution of the cases in the state courts. It is not material whether these supplemental bills so-called are full and complete as original bills. Defects could be cured upon exceptions or demurrers, or by complainants on their own motion before the filing of an answer. Nor is it material whether these pleadings are filed in the original cases or separately docketed; because if separately docketed, they will at once for trial purposes be consolidated with the old cases pursuant to Section 921 of the Revised Statutes. And whether the contention of counsel for the state officers be technically correct or not, the contention is without substantial merit as to the rights of the parties. These pleadings should be filed and regarded as having been filed on Tuesday, the 11th inst.

The fixing of rates by the Legislature is presumptively correct and the Railway Companies have the burden of proof of showing

that the statute is not remunerative. That the fixing of rates is a legislative act, all agree. But that such rates must be reasonably remunerative, cannot longer be discussed. The railways are entitled to cost and a reasonable profit, and no fair-minded man dis-
313 putes it. How to arrive at the cost and a reasonable profit, is a most difficult problem. But if the statute is challenged, it must be ascertained, and this ascertainment can only be by judicial proceedings, and must be determined by the courts, and ultimately by the Supreme Court of the United States. No skill of the draughtsman by the use of words or phrasing can take this question from the courts. It can never be settled in a criminal case by arresting ticket agents and conductors. The Supreme Court in the end must have the evidence with the right to make the ultimate findings of fact. There is but one orderly and seemly way, and that is in equity with the right of appeal to the Supreme Court, as has been said by that court over and over again. All contentions that the courts of the state can decide these questions as well as can the United States Courts, is not a question for argument because it is a question of jurisdiction, and in my judgment, in these cases this court has jurisdiction, and having jurisdiction, the jurisdiction should be exercised.

There seems to be much feeling in the minds of many as to where these cases should be adjudicated, but why the feeling I do not understand. And yet I recall the historical facts that at various times since the organization of this government, the feeling has run high as to whether the federal or state courts should adjudicate matters of importance to the public. No one doubts that the states have a right to manage their own local affairs, and to have matters growing out of their own local affairs determined by their own courts. But it is too late to seriously complain because the United States Courts take and exercise jurisdiction under the constitutional provision providing for the courts, and the enactments thereunder. The United States Courts, regardless of the citizenship of the parties, will take and exercise jurisdiction in actions of a civil nature when the provisions of the United States Constitution are invoked, as has been done in this case. The Constitution provides for this, and Congress has provided the procedure. The Commerce Clause of the United States Constitution has been invoked, as is the Fourteenth Amendment. These are national questions, and the Supreme Court will hold the scales of justice with the evidence before it, and why there should be any excitement or feeling about this, is beyond my com-
prehension. I do not know, and of course do not state, that
314 the State Legislature has wronged these railways, because that is the question to be decided when deciding the merits of the case. The railways say that they are being wronged, and they should have a hearing, and the hearing should be on the evidence, and that evidence carried in the record to the Supreme Court. And if upon the evidence the railways are being compelled to transact business at a loss, no one ought to doubt but that the Supreme Court will hold the statute void. If the rates fixed are remunerative, no one ought to doubt but that the statute will be upheld. It is too

late to talk about the alleged wrongs of the Supreme Court declaring statutes void. That question was fought out one hundred years ago, and from the organization of the Supreme Court down to the year 1888, being the period covering the first one hundred years of the United States Supreme Court, that court held twenty United States Statutes void. During the same period that court held one hundred and eighty-one state statutes void, of which fourteen were Missouri statutes. (See Appendix to Volume 131 U. S. Reports.) How many statutes have since been declared void by that court, I have not taken time to ascertain. Some of the statutes thus declared void were railway rate statutes enacted by the states.

These questions are of the greatest importance. There are many complications arising. Much is to be considered besides the mere rates or fares. There must be equality of rates, the treatment and charging of all alike. No rebates; no discriminations must be allowed. Safety of the public, including passengers and employés, must be considered. And as of much importance as any other question, if not the greatest of all, is the question of efficient service. Rapid and prompt delivery of freight must be had. Fast passenger trains with but few stops, for passengers going a considerable distance, are demanded. Local trains for local passengers, are required. To have such efficient service, reasonable compensation must be paid. All these questions are involved in the fixing of rates. Between the cities of Saint Louis and Saint Joseph, one line of railway is wholly within the state, while another and competing line a part of
315 the distance is within the state of Kansas. A like situation exists between Kansas City and Saint Joseph, and another like situation exists between Kansas City and Joplin. Possibly there are other like situations. In the case of Hanley vs. R. R., 187 U. S., the Supreme Court decided that a railway connecting two points within the state, and doing business between the two points, but with a line outside of the state a part of the distance, was engaged in interstate commerce controllable only by enactments of Congress. What about the Missouri statute fixing rates over the one line wholly within the state as against a competing line a part of the distance outside of the state? I do not intimate the conclusion, but that there is a question, can not be doubted. And if the statute is void in part, is it separable, leaving the valid parts to stand with the void parts eliminated? I simply mention these questions to show the gravity and importance of these cases without in the slightest degree intimating the conclusion, often discussed by men of great ability, but upon which as yet there has been no conclusion reached, so far as I know, by any of the courts.

It is urged with much plausibility that by reason of the case of Fitts vs. McGhee, 172 U. S., that because penalties are affixed to the Statute of 1907, that the criminal courts of the state only can take jurisdiction. I do not stop to review the various Missouri Statutes upon the subject of both passengers and freight, all of which must be considered as in pari materia; but it is sufficient to say that the inflicting of penalties is not the only remedy. The Attorney General and Railroad Commissioners still have much to do with the enforce-

ment of these statutes which the railways contend are void in part. These matters were considered, and a conclusion reached adversely to the contention of the officers of Missouri, by the Supreme Court of the United States, sustaining Judge Philips when presiding in this court, and reversing the Supreme Court of Missouri, R. R. vs. Missouri R. R. Commissioners, 183 U. S. 53. As I understand in the original eighteen cases now pending in this court, the question was and is, whether all the earnings in the aggregate are remunerative. That theory being, I suppose, by reason of the case of Smythe vs. Ames, decided by the Supreme Court, and the question is still present under the General Statutes of Missouri, the Statutes of 1905, and the Statute of 1907 in question. The time is not far distant
316 when the question will be raised, and possibly in these very cases, as to whether the statutes can stand, if some rates are too high, if the rates within the state in the aggregate are remunerative. The question will arise whether one person can have less than reasonable rates, and another be compelled to pay more than reasonable rates. Will it be a sufficient answer to say that in the aggregate the rates are remunerative? Or is that a question only between the individual and the railway company? Upon this question I intimate no ruling, but the importance of the question can not be overestimated.

These cases will be set down for hearing. The orders heretofore made will stand except as now modified. The two cent passenger fare statute should be put in force, and kept in force for some months with the rights of the railways later on to renew their motions to enjoin the enforcement of the statute. One class of people claim that with the two cent fare travel will so increase as to make it remunerative. Others deny this. The Wisconsin Commission but lately declared, after months of investigation, that in that state a two cent passenger fare would be confiscatory. Governor Hughes, by a recent veto message, so declared as against an enactment providing for the two cent fare in the populous state of New York. It may be that what will be reasonable rates in parts of Missouri on one line, will be unreasonable in another part of Missouri on another line. How can these questions be determined? Is it not at present all speculation and guesswork? Of what value will be the testimony of an ordinary business man testifying by way of opinion? And of what value will be the testimony of railway experts giving opinion and illustrating *his* opinions by the use of many figures? Experience over a reasonable period of time ought to, and no doubt will, settle these questions, at least for the time being, although what may be a reasonable remuneration one year, may be unremunerative five years hence. The Supreme Court of the United States in Smythe vs. Ames, referred to, took care of that question by keeping it open with the right to open up the case from time to time as circumstances required.

Therefore the orders will be that this court retains jurisdiction of these cases regardless of whether the pleadings tendered are consid-

ered as supplemental bills or original bills, and no order will
317 be made for some months with reference to the two cent fare statute, leaving it for the time being operative and as though in full force.

318 On the 17th day of June, 1907, an Opinion was filed. Said Opinion is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

THE WABASH RAILWAY COMPANY
vs.
HERBERT S. HADLEY, Attorney General, and Other State Officers.

And Seventeen Other Like Cases.

Remarks of Judge Smith McPherson, June 17th, 1907.

The real question here is, has this court jurisdiction over the passenger fare law of 1907 of the Missouri legislature declaring it unlawful to charge more than two cents per mile? A lesser question is whether the bills tendered for filing are supplemental bills to those filed in this court in the eighteen cases two years ago and now pending before Mr. Schofield, the Master.

I fully appreciate the responsibility resting upon me and the consequences to follow from the orders now to be made. If mistaken the mistakes are mine, even though I have had but part of one day since the argument to reach these conclusions. Never has a case before me been argued with greater eloquence, logic and power than was done by counsel both for the state officers and for the eighteen railways. Every phase of the case direct and collateral has been so illuminated that all possible questions are at the end of debate. What is the supplemental bill in equity? And wherein is the importance of defining it? Usually it is where there has been some change in the rights of the parties, which must be carried forward by a supplemental bill. One hundred and more years ago judges who had but little to do except play the rôle of mental acrobats and seek to refine and distinguish and to display an affected learning, and to discuss most gravely "the difference betwixt the west and northwest side of a hair" most elaborately set forth their views, as to
319 original bills and amended bills and supplemental bills, and bills of review, and bills in the nature of bills of review. The result was that a chancery case lasted for many years. More than fifty years ago the Supreme Court recognized the folly of much of this, and by a code of rules adopted the system of fact pleading and left the old chancery practice in force only when the 94 rules adopted did not meet the situation that might arise, and by rule 57 defined a supplemental bill. But that is not important in my judgment. Whether this proceeding should be by original bill, or by supple-

mental bill is of small consequence. If by original bill, the railways had the right to file the same without notice, and the right to a restraining order without notice. If by supplemental bill the practice is to require notice. And in either case it is discretionary with the judge to allow a restraining order without notice until a hearing can be had on notice as to a temporary injunction. On Tuesday the 11th instant, the complainants gave notice of filing these bills on Friday the 14th instant. On Thursday they asked to file them. Solely out of courtesy to the Attorney General, who was not present, this was refused; but the court on its own motion issued the restraining order, to keep the matter in statu quo. At the time fixed for the hearing the matter was again delayed for a day at the request of the Attorney General, he unavoidably being absent. During that delay the bills were filed in the State Courts. For this there is no criticism. But I have stated the facts, and the statement of facts shows that these cases, as to the laws of 1907, were pending and had been pending since Tuesday the 11th instant. And these bills must be considered as filed as of that date. And whether defective as original bills is not material, because such defects can be corrected on demurrer or exceptions, or by the complainant before answer as of course. Nor is it material whether filed in the original cases or separately docketed. If separately docketed, they will at once for trial purposes be consolidated with the old cases, pursuant to Section 921 of the Revised Statutes. If the contention of counsel for the state officers be technically correct, it is without substantial

320 merit as to the rights of the parties.

That the fixing of rates by the legislature is presumptively correct, all concede. That it is a legislative act, all agree. But that such rates must be reasonably remunerative, cannot longer be discussed. The railways are entitled to cost and a reasonable profit, and no fair minded man disputes it. How to arrive at the cost and reasonable profit is a most difficult problem. But it must be ascertained and this ascertainment can only be by judicial proceedings, and to be determined only by the courts and ultimately by the Supreme Court of the United States. No skill of the draftsman by the use of words or phrasing can take that from the courts to the town meeting. It cannot be changed by declamation, either sophomoric or by invective. It can never be settled in a criminal case by arresting ticket agents or conductors. The Supreme Court in the end must have the evidence, with the right to make the ultimate findings of fact. No local tribunal, Federal or State, can foreclose the fact as would be done if the case goes to the Supreme Court on writ of error to the State courts, and from the State courts there is no method of review but by writ of error. There is but one orderly and seemly way, and that is in equity, with the right of appeal to the Supreme Court as has been said by that court over and over again. The argument that the courts of the State can decide as to the validity of the laws of the State as well as can the United States courts will not be argued by any Federal judge, but will be conceded. Those courts are as high minded and as learned as are the Federal courts, but that is not the question. It is a question of jurisdiction. And this court

has jurisdiction and will maintain its jurisdiction. Nor is this to the prejudice of anyone. As I listended on Saturday to the argument, I was carried back to the days of 1801-9. I recalled the judicial revolutions of Virginia and Pennsylvania. I recalled the case of Luther v. Borden, growing out of the Dorr rebellion. I recalled the bitterness of half a century ago between Iowa and Missouri over the
321 State line. I recalled the recent Lives of Thomas H. Benton and Gouvernor Morris by a distinguished author who states that at one time or another every one of the original thirteen states has tried in some form or other to destroy this government. And I recalled that in every instance, save the troubles of 1861-5, that the United States Courts have, in a dignified way, settled the disputes and law-abiding people acquiesced and the lawless element were compelled to submit.

That the States have the right to manage their own local affairs will ever be maintained. But it is too late to talk about states dictating to the Government, or to riding down its courts. This is a Nation. Its commerce will not be interfered with by any State, because for that almost alone we adopted our Constitution. The Commerce Clause will always be upheld, and the rights of the citizen, including corporations, will ever be protected in their just rights under the Fourteenth Amendment. These are National questions, and the Supreme Court will hold the scales of justice with the evidence before them. I do not know and of course do not state that the State legislature has wronged these railways. That is the case on its merits. But the railways say they are being wronged, and they must have a hearing, and a hearing on the evidence, and that evidence carried with the record to the Supreme Court. And if upon the evidence they are being compelled to transact business at a loss, no one need doubt but that the Supreme Court will nullify the Statute. If the rates fixed are remunerative, the statutes will be upheld. It is too late to talk about the alleged wrongs of the Supreme Court declaring statutes void. That was fought out one hundred years ago. Down to 1888 the period covering the first 100 years of the United States Supreme Court, that court held twenty United States statutes void. During the same period that court declared as void 181 state statutes, of which 14 were Missouri statutes. (See Appendix to Vol. 131 U. S. Rep.) How many have since been declared void I have not taken the time to ascertain. And some of the statutes thus declared void were railway rate statutes, enacted by the states.
322 It must be remembered that in passenger and freight carrying there is much to be considered besides rates or fares. Important as any, if not the most important, is the equality of rates; the treatment and charging of all alike. No rebates; no discriminations, must be allowed. Safety of the public, including passengers, and employés, must be considered. And of as much importance as any other question is efficient service. Rapid and prompt delivery of freight must be had. Fast passenger trains, with but few stops, for passengers going a considerable distance, *is* demanded. Local trains for local business *is* required. To have these reasonable compensation must be paid. So that these questions are all involved. And in

consequence such business as is between St. Louis and St. Joseph, Kansas City and St. Joseph, Kansas City and Joplin and perhaps other points, where parts of the routes of some of the lines are out of the State, a grave question is presented, and no small question is covered whether parts of these statutes are void that the matter can be separated and the balance of the statute remain in force, because Congress, even as to those lines wholly within the state, may or may not have control of such commerce when it directly interferes with commerce passing out of and back into the state. I neither pass upon this question nor express an opinion thereon, because while such questions have frequently been discussed by the ablest of men, such questions have not yet been decided. I simply mention it as a great National question.

It is urged with much plausibility that because penalties are affixed to the statutes of 1907 that the criminal courts of the state only take jurisdiction. I do not stop to review the various Missouri statutes upon the subject of both passengers and freight, all of which must be construed as in pari materia. But it is sufficient to say that the inflicting of penalties is not the only remedy. The Attorney General and Railroad Commissioners still have much to do with the enforcement of these statutes, which the railways contend are void in part. In the original cases the question was whether all the earnings in the aggregate were remunerative.

323 That question is still present under the statutes of 1907. Whether these laws by raising the freight rates and lowering the passenger fares are remunerative in the aggregate must be considered by the court. The State is not in effect a party, because the charge is that these officers are seeking to enforce void statutes, in more ways than by inflicting penalties.

The orders heretofore made will stand until vacated or modified. The cases will be set down for hearing as to whether a temporary injunction shall issue? and if issued what shall be the scope? Shall they restrain the enforcement of the recent freight rate statute? Shall they restrain the enforcement of the recent two cent passenger rate statute? Tentatively, subject to argument, and subject to change of opinion, if I should hear the cases, my present view is that the two cent passenger fare statute should be put in force and kept in force for some months at least, with the right of the railways later on to renew their motions to enjoin the enforcement of the statute. One class of people claim that with a two cent fare travel will so increase as to make it remunerative. Others deny this. The Wisconsin Commission but lately declared after months of investigation that in that State a two cent fare would be confiscatory; and Gov. Hughes by a recent veto message so declared in the populous state of New York. How is this question to be determined? Is it not all speculation and guess work? Of what value will be the testimony of an ordinary business man? And of what value will be the testimony of railway experts?

Such are my present views, hurriedly stated and without time to place them in the shape of a formal opinion. Nor would it be of substantial benefit to anyone to review the many authorities. They

are known to the profession and to the courts. But I have stated what the law is as I understand it to be.

324 On the 31st day of March, 1908, an Opinion was filed. Said Opinion is in words and figures as follows:—

In the Circuit Court of the United States in the Western District of Missouri.

No. 2988.

THE SAINT LOUIS & SAN FRANCISCO RAILROAD COMPANY, Complainant,
vs.
HERBERT D. HADLEY, Attorney General, and Others, Defendants.

And Seventeen Other Like Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3004, 3005, 3006.

Frank Hagerman and others for Complainants.
Herbert S. Hadley, Attorney General.
John Kennish, Assistant Attorney General.
F. W. Lehmann and S. B. Ladd, for Defendants.

Opinion.

SMITH MCPHERSON, *Judge:*

Here are eighteen cases, brought by as many railway companies of the state, against the Attorney General, Railroad Commissioners of the State, County Judges, county Treasurer- and shippers.

The purpose of the bill in each case, is to enjoin the enforcement of state railway rate statutes on the ground that the rates thus fixed by legislative enactment, are not remunerative, but are confiscatory. The original bill of complaint in each case was filed in 1905 assailing an Act approved April 15, 1905 fixing rates. In June of that year temporary injunctions were issued. In December of that year answers were filed, and on defendant's motion the cases were referred to a Special Master before whom the cases are still pending.

That statute was enacted in lieu of certain sections of the Revised Statutes of the State.

In 1907 the Legislature enacted a statute which was approved March 19, 1907. This statute after referring to the one of
325 1905, declared that the same "be and hereby are repealed, and the following to be known as sections 1194, 1194*a*-1, 1194*b*-1, and 1194*c*-1 of said Revised Statutes, are enacted in lieu thereof."

Then follow four sections designated as above.

By still another statute passenger fares were fixed at two cents per mile, theretofore three cents per mile.

In June 1907 each company filed another bill, concerning which see the opinion by this Court in this case in 155 Federal Reporter 220. Since that time the cases have been pending before the Master, the delay occasioned in part at least by an awaiting of a decision of the Supreme Court in what are known as the Minnesota and North Carolina cases. This Court declined to grant a temporary injunction as to the passenger rates, but granted such writ as to the freight rates. Both statutes of 1907 provide for penalties for a violation of the enactment, and expressly recite that any liability or penalty incurred under the statute of 1905 may still be enforced. It is now claimed that the original cases are at an end because the statute of 1905 has been repealed. The Court cannot so hold. As has been noticed for the statute when repealed, there was a substitute enacted. One rate was cut out and another fixed, with the penalties under the prior statute remaining. This does not overthrow the original cases. They are rightfully pending with part of the subject matter still in existence, and a new alleged grievance in place of the old. This new grievance, if one, should be brought forward by a supplemental bill that being the office of such a bill.

Two shippers on each road are made defendants. That it is proper to make them parties cannot be in doubt, as they have a direct interest. Whether a decree herein will be binding on other shippers, is a question not now for decision. And that the County Judges and Prosecutors have to do with these laws is plain. But these matters are exceedingly technical. The real question as to parties, is as to making the Railroad Commissioners and Attorney General parties defendant. As to the right to make the Attorney General and the Commissioners parties defendant, is a question that has been argued for and against with much earnestness and by the citation of many authorities.

326 At common law the office of Attorney General was the highest law office of the Crown. He represented the Crown in all legal matters and was the responsible officer as to the legal duties and prerogatives, appearing in the courts of record and the House of Lords in all matters affecting the public, to the end that justice might be done in the name of the King. The duties of that office are not less in this country, and the specific mention of many things that he must do in behalf of the public and the State are not to be regarded as exclusive in the full performance of his duties.

The Constitution and Statutes of Missouri make special mention of many things that he is required to do. He is upon a salary, and cannot receive fees. He is a member of the State Board of Equalization and of Education, as well as other Boards. He prosecutes suits on official bonds. He prosecutes railroads for refusing to grant proper rates to shippers. He must appear before the Interstate Commerce Commission when residents of the state are being wronged. He asks for, and receives, the aid of additional counsel. He sees to the enforcement of the banking laws, and proceeds against express companies and railroad companies and looks after forfeitures. These and a great many other things he is specifically required to do And the importance and dignity of his office are such, that in most in-

stances he is relieved from making oath to papers that he is permitted or required to file. And then out of apprehension that because certain things are specifically mentioned, that the conclusion would be arrived at by construction that all other matters were excluded, Section 4943 of the Revised Statutes was adopted, requiring that officer to institute and prosecute all suits and other proceedings at law and in equity requisite or necessary to protect the rights and interests of the state and to enforce any and all rights, interests or claims of the state against any and all persons and corporations.

It would seem that from the foregoing there could be no doubt but that it is the duty of the Attorney General to enforce the statutes in question presented by these cases, if valid, not only by virtue of the duties pertaining to that office by common law, but as well by the statutes just alluded to.

327 But there is a further statute which counsel on both sides have overlooked. Chapter I of the Laws of 1907 by Section 61 thereof eliminates all doubt by appropriating twenty thousand dollars per year to be drawn by the Attorney General from time to time—

"which said sum shall be expended under the direction of the attorney general in the prosecution or defense of suits heretofore brought, or that may hereafter be brought by or against any railroad company, wherein the validity of any act of the general assembly may become involved or contested."

It will be noticed that this appropriation of this large sum of money is made not only to the end that the attorney general may seek to maintain the validity of any statute brought in question by any case hereafter brought, but likewise covers cases heretofore brought. And in the light of that section appropriating forty thousand dollars for the biennial period of two years, to be drawn by the Attorney General and expended under his direction, leaves no room for argument that it is the duty of the Attorney General to enforce all statutes enacted by the General Assembly and see to it to the best of his ability that no court by decree or judgment holds the state enactments void.

Without scheduling the different statutes, the duties of the Commissioners are likewise plain. They are vested with authority to fix rates, and should the statutes in question be overthrown as being void, they will at once fix some other rate in their judgment valid. The question as to making the Commissioners parties defendant has been put at rest by the case of the Commissioners vs. R. R. 183 U. S. 53.

Again, as when the cases were brought, and first argued, it is urged that the state in effect is being sued in violation of the Eleventh Amendment, and the question has again been argued with force, logic and eloquence. That a determined effort has been made by the use of words, phrasing and forms within the past two years, regardless of substance, effect and meaning, by the states to deprive the

United States Courts of jurisdiction vested by the Constitution
328 and laws enacted by Congress, is known by all. The argument is to the effect that all litigation of and concerning the fairness, and validity as well, of state statutes shall be in the courts of the state whose legislation is assailed, leaving the right and the only right of carrying questions of law to the United States Supreme Court by writ of error, but likewise insisting that in cases as to the reasonableness of rates, dependent wholly upon facts, that a writ of error be unavailing, and that the state courts of the state whose state legislation is assailed, shall alone and finally decide the case. And that this will be so in a chancery case as well as in an action at law by the only remedy, by writ of error to a State Supreme Court, when the case depends upon questions of fact, has been held by the Supreme Court in Egan vs. Hart, 165 U. S. 188. There are others who believe that all matters both of fact and law arising under the Constitution of the United States should in the end be decided by the only court created for that purpose. So it is that a sharp conflict is presented. Almost from the beginning of our government this question at short recurrent periods has arisen, but generally concluded by the Supreme Court holding that this is a National government with a National Judiciary, and that the National Constitution is and shall forever remain the supreme law of the land, anything in the laws of any state to the contrary notwithstanding. When our government was organized, every of the thirteen states was in debt, and some of them well nigh hopelessly so. In and out of both the National and State Conventions the arguments were for and against whether a state could be sued in a National Court. Hamilton and Marshall and Madison said it could not be done. Patrick Henry with his numerous doubts and opposition was filled with fear. Others like James Wilson and Edmund Randolph said the state would and ought to be suable by a citizen of another state for wrongs done. Near the end of Washington's first term, the famous suit of Chisholm
vs. Georgia was decided, the holding being that Chisholm, a
329 citizen of South Carolina, could recover judgment for money that the State of Georgia justly owed him.

It is said that within two days from that decision, a resolution was offered in the Senate to amend the Constitution to prevent such suits, by declaring that the Judicial power shall not extend to any suit against a state by a citizen of another state. But that failed because it was urged that notwithstanding the decision in the Chisholm case, such jurisdiction had never extended nor existed. Thereupon new phrasing was adopted, and a new resolution was offered, reciting that "The Judicial power of the United States shall not be construed to extend to, etc.," shortly ripening into the Eleventh Amendment. The only purpose of that Amendment was to prevent a state from being sued by its creditors, and history furnishes the proofs conclusive of the correctness of the statement. Those who are doubtful of this need only read what Chief Justice Marshall said in Cohens vs. Virginia (6 Wheaton).

At common law from time immemorial, a public officer was not allowed to justify under a void law or void order, but was compelled

to make restitution of the property taken or to pay damages therefor. And such has been the uniform holdings in this country, and for the reasons that a void statute or void order is utterly without effect and is wholly unavailing as a defense. Such has been and is the law of England, and such has been and is the law of this country. And why such should not be the law on the equity side of the docket by preventative remedies against threatened wrongs, is difficult to conceive.

But the Supreme Court has held in the cases of In Re Ayres, 123 U. S. 443, and Fitts vs. McGhee, 172 U. S. 516, that in cases wherein the state as a state is affected, that a suit against the officers is in effect one against the state in contravention of the Eleventh Amendment. It is to be noted that both the cases above referred to would have been decided as they were decided, if taken to the Supreme Court by writ of error to a State Supreme Court, or by appeal from a Circuit Court, if the Eleventh Amendment had never been adopted. This is so because in the Ayres case a full, adequate and complete remedy at law existed, and in the case of Fitts vs. McGhee the sole purpose was to enjoin criminal proceedings.

330 But it is now too late to object to the jurisdiction of a Circuit Court to enjoin the enforcement of a rate statute alleged to be void because confiscatory, although concededly the holdings now are that the test is not whether the state is a party to the record by name, but is the state in effect a party?

But in the case at bar the state as a state has no interest. And the state as a state is not attempting to confiscate property. It is the government of the state, first by its legislature, and then by its officers, who according to the allegations of the railways, are attempting to confiscate property. Whether such acts will amount to confiscation if carried out, relate to the case on its merits. But the point to the whole matter is, that the state is not seeking to act, and no effort is made to enjoin the state, either by name or in effect. And this distinction is not metaphysical, but is a substantial distinction, clearly and unmistakably pointed out by Justice Matthews in Poindexter vs. Greenhorn, 114 U. S. 270, *290*, wherein he said:

"In the discussion of such questions, the distinction between the government of a State and the State itself is important, and should be observed. In common speech and common apprehension they are usually regarded as identical; and as ordinarily the acts of the government are the acts of the State, because within the limits of the delegation of power, the government of the state is generally confounded with the State itself, and oftener the former is meant when the latter is mentioned. The State itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative, but outside of that, it is a lawless usurpation. The Constitution of the State is the limit of the authority of its government, and both government and state are subject to the supremacy of the Constitution of the United States, and of the laws made in pursuance thereof. So that, while it is true in respect to the government of a State, as was said in Langford vs.

United States, 101 U. S. 341, that the maxim, that the king
331 can do no wrong, has no place in our system of government; yet, it is also true, in respect to the State itself, that whatever wrong is attempted in its name is imputable to its government, and not to the State, for it can speak and act only by law, whatever it does say and do must be lawful. That which, therefore, is unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the State, but it is the mere wrong or trespass of these individual persons who falsely speak and act in its name."

So that it follows that the State of Missouri is not a party either by name, nor in effect. And this Court has jurisdiction both of the subject matter and of the parties, to inquire into the questions in the case and on a final hearing decree whether the rates fixed by statutes are remunerative or confiscatory.

On what basis the Master shall report, is not clear. Every person whether a passenger or shipper, is entitled to have efficient service at reasonable rates, which the company must give for such compensation. Whether such charges for every person can be fixed by a decree, is doubtful, and in any event will be attended with much difficulty. But if all earnings in the state for state business are to be taken in the aggregate, less expenses, the question is attended with difficulties, because of the matter of expense, it being difficult to apportion the expenses between the state and interstate business.

If the parties cannot agree, the Master should be directed by a supplemental order.

These cases should be brought to a final decree, and that decree such as can be carried to the Supreme Court for final determination, and not for a reversal because of an error of the Master or the Court in determining the expenses. What would be still more to the point would be for the Master to determine the expenses from the standpoint of both the railway company and the Attorney General. And there is no valid reason why the cases should not be brought to a conclusion within the next ninety days. And if this is not done the delay will not be chargeable to the Court.

332 This memorandum opinion was written many weeks since, but withheld by request, awaiting the decisions of the Supreme Court in Minnesota and North Carolina cases. Those cases were decided on the twenty-third instant, adversely to the State officers. And it is deemed unnecessary to await the opinion, which this Court has not yet seen.

Kansas City, Missouri, March 31, 1908.

333 The Opinion filed on the 8th day of March, 1909, is in words and figures as follows:

In the Circuit Court of the United States, Western District of Missouri, at Kansas City.

No. 2988.

THE ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Complainant,

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri; Joseph P. Rice, John A. Knott, and Frank A. Wightman, Railroad Commissioners of the State of Missouri, et al., Defendants.

And Seventeen Other Like Cases, Being Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3006.

Mr. Frank Hagerman for each and all of said Eighteen Railroad Companies.

Mr. Herbert S. Hadley, Attorney General, Mr. John Kennish, Assistant Attorney General, Mr. S. B. Ladd, and Mr. Frederick W. Lehmann, for all defendants, in all of said cases.

With Mr. Hagerman the following appeared for the railroads as designated:

Mr. W. F. Evans for St. L. & S. F. R. R. Co.
Mr. M. A. Low for C. R. I. & P. Ry. Co.
Mr. M. A. Low for St. L. K. C. & C. Ry. Co.
Mr. O. M. Spencer for C. B. & Q. R. R. Co.
Mr. J. G. Trimble for Q. O. & K. C. R. R. Co.
Mr. Gardiner Lathrop for A. T. & S. F. R. R. Co.
Mr. S. W. Moore for K. C. & S. Ry. Co.
Mr. Geo. P. B. Jackson for M. K. & T. R. R. Co.
334 Mr. J. L. Minnis for Wabash R. R. Co.
Mr. R. A. Brown for St. J. & G. I. Ry. Co.
Mr. E. L. Scarritt for C. & A. R. R. Co.
Mr. John H. Lucas for K. C. C. & S. Ry. Co.
Mr. M. L. Clardy for Mo. Pac. R. R. Co. and St. L. I. M. & S. R. R. Co.
Mr. J. D. Hostetter for St. L. & H. Ry. Co.
Mr. S. H. West for St. L. S. W. Ry. Co.

Opinion.

SMITH MCPHERSON, *Judge:*

1. Each of the eighteen railroad companies is doing a general railroad business within the State of Missouri, all but one doing both a state and an interstate business. Under the general railroad statutes of the state, the railroads were classified under three classes, the one class being allowed to charge for passenger rates three cents per mile, and the other two classes, four cents per mile. Freights

likewise were classified with certain maximum rates. The Railroad Commissioners of the state were authorized to fix and establish rates, not in excess, however, of these maximum rates fixed by statute.

In the year 1905 the Legislature of the state by statute which took effect June 16th, 1905, provided for certain maximum charges. On the day the statute took effect each of the railroad companies filed their bills of complaint herein against the Attorney General and Railroad Commissioners, asking that they be enjoined from enforcing the statute upon the ground that the rates thus fixed were not remunerative, resulting, as is alleged, in the taking of their property without compensation. A restraining order in each case was issued, and within a few days thereafter upon notice and full hearing, a temporary writ of injunction as prayed was issued. Several months thereafter the cases were referred to a Special Master to take the evidence and make his findings of fact and report the same to the Court.

335 In 1907 the Legislature of the state repealed the statute of 1905 and enacted a substitute therefor, which act was to take effect in June, 1907. On or about the day the statute was to take effect, each of the complainants filed its amended and supplemental bill setting forth the pendency of the actions and the action theretofore taken by the Court therein, and asking that the enforcement of the statutes, one of which fixes certain maximum freight rates, and the other, passenger rates of two cents a mile, be enjoined on the ground that such rates were not remunerative, but confiscatory, and if enforced, would be taking the property of the railroad companies without compensation. At or about the same time the state officers instituted proceedings in certain State Courts of Missouri against the railroad companies asking for an order that said two statutes of 1907 be enforced.

The Attorney General and his associates insisted that an entirely new situation was presented and insisted that the proceedings were instituted in the State Courts in advance of filing the Supplemental bills herein, and insisted that the State Courts had first acquired jurisdiction of the subject matter which would be to the exclusion of any action by this Court. The railroad companies insisted that the general subject matter was covered by the original bills of complaint and defendants' answers thereto, and that the statutes of 1907 should be carried forward by supplemental bill. It was likewise most earnestly contended that the actions in this Court were in effect against the State of Missouri in contravention of the Eleventh Amendment to the Constitution of the United States. But this Court after the fullest argument and consideration adjudged that this Court was not seeking to take jurisdiction against the State of Missouri as a state, and that the very office and nature of the supplemental bill as recognized from time immemorial by the equity practice required this Court to take cognizance of the supplemental bills and proceed with the litigation. (161 Fed. 419.)

336 In June last by agreement of parties, the Court revoked the previous order of reference to the Special Master and di-

rected him to return to this Court the evidence he had already taken, and ordered that the case be tried upon oral testimony and such documentary evidence as the respective parties might offer. The evidence has been concluded, and the cases have been fully argued, and are now for final decree.

2. Many believe that the better and safer practice would be to confine all litigation to the State Courts wherein is involved the validity of rates to be observed by railroads and other public utilities when such rates are fixed by ordinances of a city or statutes of a state. It is insisted that this would be more deferential and more in a spirit of comity to first allow the State Courts to pass upon such questions. It is urged that the decree of a State Court could be carried to the Supreme Court of the United States for final decision.

This is plausible and convincing to men who have not thoroughly considered the question. It is plausible, because such a course can be followed. But every thoughtful and patriotic man well knows and believes in the proposition that the Supreme Court of the United States should ultimately pass upon all questions arising under the Constitution of the United States. And the question whether rates thus fixed by ordinance or statute are confiscatory or remunerative, is one arising under the Constitution of the United States, and that question is wholly a question of fact, and is not longer an open question as to the law. This being so, the question cannot be passed upon by the Supreme Court of the United States on these questions of fact when there is a conflict in the testimony. Section 709 of the Revised Statutes of the United States is the only authority for taking a case from the highest court of a state to the Supreme Court of the United States, and the procedure thereby allowed is by writ of error. And the office of a writ of error is to authorize an appellate court to review questions of law and not to review questions
337 of fact. So that when a case goes from the Supreme Court of a state to the Supreme Court of the United States, it can only go by writ of error, and the Supreme Court of the United States necessarily must take all questions of fact as being foreclosed by the State Courts. Therefore, when the case is wholly dependent on controverted questions of fact, it is utterly useless to carry the case to the United States Supreme Court from the decision of the State Courts, as an affirmance necessarily will be ordered, and the question as to whether the United States Constitution is being trampled down cannot be considered. There is no other method of reviewing the decision of the State Court by the Supreme Court of the United States than by writ of error, and this is so in chancery cases as well as in actions at law.

State Corporation Com. of Va. v. Atlantic Coast Line Co., recently decided by the Supreme Court of the U. S.

Bement v. National Harrow Co., 186 U. S. 70, 83.
Dower v. Richards, 151 U. S. 658, 666.
Egan v. Hart, 165 U. S. 188.
Adams v. Church, 193 U. S. 510.
Chrisman v. Miller, 197 U. S. 313, 319.

It follows that all efforts to enforce the trial of such questions in State Courts would result, if successful, in having the State Court finally determine when the National Constitution as the supreme law of the land, shall be applied. The Supreme Court of the United States is the tribunal to finally determine all questions, including those of fact, wherein the National Constitution is involved.

3. Upon their face the statutes in question are with reference only to state commerce. But it is urged that they are void because in effect they directly have to do with interstate commerce. The facts are as follows:

Between Kansas City and the Joplin mining district there are three lines of railway. The Missouri Pacific between these points is wholly within the state, and the other two, partly within and
338 partly without the state, and heretofore between the two Missouri cities of Kansas City and Joplin, are doing an interstate business under the decision of Hanley v. R. R., (187 U. S. 617). The same situation exists between the cities of St. Joseph and Kansas City, two of the roads being wholly within the State between the two points, and two partly within and partly without.

And between the cities of St. Joseph and St. Louis such situation is emphasized, the Burlington road being wholly within the state between the two cities, and the Missouri Pacific a part of the distance being within the State of Kansas. The facts are that when the Missouri statutes lowered the passenger rates on the roads wholly within the State between said points, the interstate roads between said points were compelled by competition to lower their rates to correspond with the state rates thus fixed by statute. By reason thereof the argument is that the Missouri statutory rates control the interstate rates between the cities named, and therefore are void as being in conflict with the Commerce Clause of the National Constitution.

During the period of railroad building, for a time the western termini were at the Mississippi River. By reason thereof, and by reason of competition on account of river transportation, the railways fixed rates from the East to that river. After a time roads were completed to the Missouri river. Rates to points on that river were fixed on rates to the Mississippi River, plus rates between the two rivers. And for thirty years or more rates have been thus fixed. And as the Missouri statutes lower the rates between the two rivers, the argument is that the statutes lower the interstate rates from the East to Missouri River points, and to points to the West.

This presents a great question, and one which is far reaching and in importance cannot be overstated. In the great case of Ex parte Young, (209 U. S. 123,) decided but last year, the Supreme
339 Court in its majority opinion in speaking of this, said: "The question is not, at any rate, frivolous." But the point was not decided. But here the question is fairly and sharply presented for decision, with no precedents directly in point.

From the days of the Confederacy to the present time there have been clashings between the National Government and the States, owing, in part to the ever changing trade and commerce, and in

part to the different schools of belief as to our system of government. And the pendulum will ever move back and forth. Even those who most strongly denounce the Kentucky Resolutions, and the doctrine of nullification, are often the first to forget that they believe in not only the express but the implied powers of our government as taught by Marshall in McCullough v. Maryland (4 Wheaton) and that this government is one of the whole people. Such as thus believe are often the first to advocate and rush through in the form of state regulation, measures for their own state, regardless of the rights of the people of other states. Neither the Ohio River, nor any other boundary has been the dividing line. Many of the cases in which state statutes have been declared void by the Supreme Court are statutes requiring a license to sell imported goods; imposing a tax on bills of lading for gold carried out of the state; imposing taxes on alien passengers; imposing taxes on passengers and merchandise carried into or out of the state; taxing drummers; regulating telegrams sent to other states; taxing those who use wharves; requiring inspection of animals for slaughter; and other like statutes in principle. All such statutes have gone down by reason of the Commerce Clause, and the uniform holdings of the Supreme Court.

The Commerce Clause gives Congress the power to regulate commerce:

1. With foreign nations;
2. Among the several states;
3. With the Indian tribes;

340 As to the first and last no doubt Congress can not only regulate, but can prohibit. It is another proposition whether commerce can be prohibited among the states.

One of the methods resorted to for the construction of Constitutional provisions, as well as of statutes, is to ascertain the then existing evils. We find that New York and other sea coast states placed burdens on commerce from inland points to sea coast points and across such states for shipment by water. It was burdens on commerce that the inland localities complained of, and that such burdens should not be imposed, was the reason for adopting the Commerce Clause. If there had been no such burdens, it is likely that there would have been no Commerce Clause, and possibly no Constitution. I have searched diligently, but find no case decided by the Supreme Court declaring a State statute void that did not in some form and in some manner place a burden on, or in some way hamper or obstruct, commerce from or to another state.

The case of Louisville & Nashville R. R. v. Eubank (184 U. S. 27), comes more nearly sustaining the proposition that the Statutes of Missouri impinge upon the Commerce Clause than any other case that I recall. There the State of Kentucky by its Constitution provided that more should not be charged for a short than a long haul. The Company had rates in force from Nashville, Tennessee, to Louisville, Kentucky, which were less than was being charged from points in southern Kentucky to Louisville. This was held

by the Court of Appeals of Kentucky to be in violation of the State Constitution. So that we have a case of a state law, with the decision of the State Courts read into it, providing that more shall not be charged for a short haul wholly within the state, than for a long haul partly without the state. This must be so, because the same provision of the Kentucky Constitution when applied to places all within the state was upheld by the Supreme Court, as will appear from the case of Louisville & Nashville R. R. v. Kentucky, 183 *R.* S., 503.

341 And the case of Wabash &c., R. R. v. Illinois, 118 U. S. 557, was decided in like manner, because and for the only reason that the Supreme Court of Illinois had so ruled as to read into the statute the objectionable feature.

But the Missouri Courts have not so construed these statutes of the state. When they do so decide, then the Eubank, and Illinois cases will be the precedents to thwart such legislation as thus construed. In the meantime there is no belief that the Missouri Courts will so decide.

The case of Hall v. De Cuir, 95 U. S. 485, is cited by counsel for the railways. Louisiana had a statute requiring carriers to receive and carry passengers without distinction on account of race or color. The steamboat in question plied between New Orleans and Vicksburg, doing both a state and an interstate business. The vessel was duly enrolled and licensed for the coasting trade. The boat had an upper and a lower cabin, the upper for white people, and the lower for colored persons. The plaintiff De Cuir was a colored woman, and took passage at a landing in Louisiana for another landing in that state. Being refused admission to the upper cabin solely because she was colored, she was awarded damages in a State trial court, which judgment was affirmed by the State Supreme Court. The Supreme Court of the United States reversed the judgment. Two reasons were given for the reversal, the one by Justice Clifford on the ground that navigation of the Mississippi River is wholly within the control of Congress. The other opinion was by the Chief Justice who grounded his opinion upon the proposition that with the objections of most people to associating and rooming with colored persons, that to allow a colored woman to be carried in the first cabin, even though but for a ride within the state, would drive white passengers seeking an interstate ride from the boat. Or, as I have hereinbefore stated the statute in effect placed a burden on the interstate business. After discussing the question, and the many and great difficulties in applying the Commerce clause, the Chief Justice said:

342 "But we think it may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress."

The State statute in order to be declared void, must by its terms and recitals interfere directly with commerce to or from another state, or the statute by construction given it by the highest court of the state must so operate in its results. But here we have no

such recitals in the statute, and it has not been so declared to mean by the Missouri Courts. And while counsel for the railways do not in terms so insist, they in effect urge that the laws of political economy, custom and convenience shall act as a substitute for Missouri statutes, and the decrees of the Missouri Supreme Court. In other words, they in effect, and I believe in language insist that the rules formulated a third of a century ago for making rates first to the one river, and then between the two rivers, and the laws of competition, shall be regarded as the equivalent of statutory law. I am mindful that it is believed by many that to not recognize these laws of trade, will impair if not destroy the great cities like St. Joseph, Kansas City and St. Louis. I am mindful of the fact that between the two rivers the distance by the Burlington is but 198 miles, with other roads 300 miles or more, and that the shorter road necessarily fixes the rates between all points on the rivers. But competition does that, and the statutes are silent. The statute may or may not be unfair. I am considering the Commerce Clause as to its bearing on statutory enactments, and am not forgetting that many valid statutes are unfair, and some even unrighteous.

I have believed heretofore that the rights and duties, powers and prerogatives of any one state are the same, neither more nor less than those of any other state, and this is so whether we compare two or more of the original Thirteen, or one of the older with one of the newer states. But in effect the argument of counsel for the railways is that this is not so. Missouri and Maine
343 were admitted into the Union the same day by the same enactment. Maine has but its percentage of commerce into and out of the state, with no trans-state business by reason of its geographical position, and has no large city. Missouri is a central state, with large cities, one of which is third in importance as a wholesale center, and second to but few as a manufacturing place. St. Louis and Kansas City are the gateways for both commerce and passengers, surpassed only by one, or possibly two other places. These facts are of tremendous importance to those who legislate either for the state or the nation. That legislation can be harmful to these great interests, any thoughtful person can readily see. But that these facts, important as they are, can be used to give a construction to or coloring of the Commerce Clause, I do not believe. In my opinion it is much the wiser to contend for the strength and power of the nation, by insisting also upon the rights and powers of the states as was intended they should have. For a third of a century it has been the recognized constitutional construction that the states have the power within defined limits to regulate charges by railways wholly within the state. And to now say that one state like Maine can regulate charges by a railway for transportation wholly within the state, and that Missouri cannot because flanked by two great rivers, and by a long time custom in fixing rates, is to announce a rule not heretofore recognized, and in my opinion one entirely illogical.

It may or may not be true, that it would be for the better to have all the interstate railways of the country, doing both a state and an interstate business, under one supervising authority, such as a commission, regulating both classes of business. But under the Commerce Clause can this be done?

Employers' Liability cases, 207 U. S., 463.
Wabash R. R. v. U. S. (7th Circuit) — Fed. Rep. —.
9 Columbia Law Review 38.
U. S. v. Colorado &c. R. R. Co. 157 Fed. 321 (8th Circuit).

344 Difficult as these problems are, they can and will be solved, and for the right. Pessimists discourage. However, their statements that everything is wrong, and will grow worse, must be heavily discounted. Because railway systems reach into many states and are units, crossing state lines arbitrarily fixed, a hopeless condition is not thereby brought about. It is not true as some say, that each state can lower the rates to confiscation, as all know who have read the decisions to any purpose. I believe as firmly as does anyone in the power and the rights of our general government, and when the clashings come as to the power of the state and the general government, let the doubts be solved in favor of the government. But as to some matters there are no doubts, and two of these are that the Constitution is the supreme law of the land, and that as to all local matters the states are in control. All should insist upon both.

4. It is contended that the statutes are void because of the excessive penalties, reliance being based on the case of Ex parte Young, (209 U. S. 123). Until the decisions in the Minnesota cases, (134 U. S. 418 and 467) it was an open question whether a review of rates fixed by a legislature or a commission acting under a legislative authority, could be had by the courts. The Minnesota statute authorized a commission to fix certain rates, which rates thus fixed should be final and conclusive. The Supreme Court of the State adjudged that such rates were not merely advisory, nor prima facie reasonable, but conclusive and not subject to review by the courts. (37 N. W. 782.) But the United States Supreme Court reversed that decision, and notwithstanding the strong dissenting opinion by Justice Bradley, concurred in by Judges Gray and Lamar, and Justice Miller hesitating, the question is now at rest, and the courts not only can, but must, determine the question whether such rates are reasonable.

In time the Legislature of Minnesota believed it could in another way make its determination as to rates conclusive and beyond the powers of the courts to interfere. This was
345 attempted by providing penalties for violations, to that which was equal for one week's business to life imprisonment for all officers and agents, and confiscation of all the railway property, if resistance by litigation was made, and such litigation failed. The decision in Ex parte Young followed, the Supreme Court failing to see the distinction between a statute providing that agents should become felons with life imprisonment pronounced, and all corporate property seized and confiscated, if an unsuccessful contest should be made in the courts.

The Statute of Missouri of April 15, 1905, covered by the original bills herein, fixes the only penalty for violations by allowing treble damages, and a reasonable attorney's fee. Citation of authorities need not be made to sustain such penalties. And in any event that statute has been repealed. The two cent passenger rate statute of February 27, 1907, provided for a penalty of not less than one hundred nor more than five hundred dollars. What shall be deemed a complete or separate offense is not defined. The freight rate statute of March 19, 1907, provides for no minimum penalty, but the same shall be a fine not exceeding five thousand dollars. Imprisonment is not designated under either statute, unless by some general statute for the non-payment of the fine; while under the Minnesota statute the penalty for each offense was fixed at a fine of not more than five thousand dollars, or imprisonment in the State prison for not more than five years, or both.

This objection to the Missouri statutes is without merit.

5. Evidence is before the Court tending to show that a large number of men have been discharged from the service of the railroad companies by reason of the reduction of rates. And this fact is urged as one element that should be considered. It is true that before interest can be paid on the bonded debts, that operating expenses, including labor, and materials, largely made up from labor, must be paid. And as of course all of these including interest must be paid before dividend checks are issued. The states should
346 and usually do attempt to legislate in the interest of laboring men. And if the legislation under consideration is hostile to their interests, the legislature, and not the courts have the responsibility. I agree to all that was said in argument in their behalf. I agree that in sobriety, and intelligence, and faithfulness to duty, they are surpassed by no other class of men. Their dangers are great, and the people owe them much. But if employés are reduced in number, or now or later on their compensation will be reduced, and if such results are by reason of legislation, then their remedy, if they have one, must be sought elsewhere than in the courts.

6. It is urged in argument that the reduction of rates will impair the service to the public. The charter of a railroad is an implied contract with the state. The company is given such right under such contract to perpetually operate its road. The state agrees that it shall be reasonably and sufficiently remunerated according to the business done. The company agrees to furnish reasonably efficient service. To furnish no service is a complete breach of the contract. To furnish a partial service is a partial breach. What is a reasonable service, is a question of fact dependent upon the circumstances of each case.

Thus it is that the Supreme Court has held that in some instances state legislation is valid which requires through and interstate trains to stop at important towns to let off and take on passengers, state and interstate.

Mississippi v. R. R., 203 U. S. 335.
L. S. & M. S. Ry. v. Ohio, 173 U. S. 285.
Gladson v. Minnesota, 166 U. S. 427.

And in other cases such state legislation has been declared invalid.
R. R. v. Illinois, 163 U. S. 142.
R. R. v. Illinois, 177 U. S. 514.
R. R. v. South Carolina, &c., 207 U. S. 328.

347 All those cases turned on the facts, and the question of fact was as to the service the public should have.

Of course the service rendered and the compensation received should have a proper relation. The expenses incident to, and that can be specifically located in connection with, a particular train, are not all the expenses to be accounted for, as will hereafter be discussed. But it is true that without reasonable compensation there cannot be reasonable service. It is common information that the public in many localities is demanding increased service.

But this phase of the question is so indefinitely covered by the evidence, and is so general in the very nature of the question that no decree can be rendered herein that will cover the proposition.

7. It is urged that these statutes are void because they are not enforceable as to some of the railway companies within the state, and the claim is, that being void as to some, they are void as to all. It is conceded in argument that as to two roads, the St. Louis & Hannibal, and the Kansas City, Clinton & Springfield, the rates fixed are not compensatory. The State's experts agree to this.

Usually statutes fixing rates for railroads to observe, classify the roads according to their earning power, and fix the highest rates for those earning the least. But this was not done, except that railroads of a length not greater than forty-five miles not owned nor leased nor controlled by a trunk line, may change four cents per mile per passenger.

The sole theory upon which rates are adjudged void can only be that the rates are not compensatory, and to so decree, the Court must have the complaint of each and every road making the claim. Complainants have recognized this by their counsel in bringing as many independent actions as there are railroads complaining. Whether there are any other railroads within the state than these eighteen complainants, neither the allegations of the pleadings nor the
348 evidence show. Perhaps the court should take judicial notice of whether there are other roads or not. Be this as it may, the Court is not advised. I assume there are no other roads within the state than these eighteen.

The record shows that two of the cases, those brought by the Rock Island and the St. Louis, Kansas City & Colorado, have been consolidated for trial purposes, the one road having become the owner of the other since the litigation commenced. The record further shows that nine cases were tried, and that the other eight cases were to be covered by decrees the same as decrees in some of the cases tried, the particular cases being designated by the record. All this shows to my mind that complainants' counsel rightly conceived the theory upon which these bills of complaint were presented. The record shows further that before the Master, there were many attempts for position on both sides as to what cases should be tried, the Attorney

General and his associates desiring that the Burlington and two other strong roads having the short lines, should be heard, and the others either continued, or that decrees in the other cases should follow the decrees in the cases of the strong roads. Counsel for the railroad companies were desirous of trying the cases brought by some of the other companies, or at least that the roads should be classified into three or four classes, but that the Court should hear only one case of each class. This emphasizes the theory that was in counsel's minds all the way through this litigation.

In one respect at least it seems to me that these statutes should be declared valid or void as the facts may warrant, as has been frequently done with reference to ordinances of cities. The ordinances of cities regulating speed both for trains and teams are declared unreasonable, and therefore not enforceable as to some parts of the city, and valid and enforceable as to other parts of the city not so densely populated. These statutes are not void upon their face. The company which alleges that they are void must make a showing that the rates, considering all the facts and circumstances, are not compensatory as to that particular road, failing in which,
349 the statute will be enforced, and successful in which, as to that particular road the statute will not be enforced.

The case of R. R. v. McKendree, (203 U. S. 514,) is not in point, because there the question was with reference to an order of the Secretary of Agriculture which was void in part and was not separable, it not being possible to eliminate the valid from the void features.

The Cotting case (183 U. S. 79,) was decided by reason of an entirely different principle. The statute in that case on its face shows that a company doing little business was not to be regulated, while the company doing much business was made subject to the statute. And by reason of that vice, the statute was held void. That the Cotting case is not in point, see:

St. Louis &c., v. Illinois, 185 U. S. 207.
McLean v. Arkansas — U. S. — (January 4, 1909).

The Connolly case (184 U. S. 540) was likewise decided in part at least because the statute did not apply to all classes of persons engaged in a like business, and that the statute was not separable, the valid from the invalid.

The case of Ju Toy, (189 U. S. 253) the Trade Mark cases, (100 U. S. 82,) and the recent case of Howard v. R. R., (28 Sup. Ct. Rep. 141,) were decided by reason of this same principle, namely, as to whether the statute is separable or not.

Therefore the holding is that these statutes are not void upon their face, and cannot be declared void for the one reason that the evidence shows they are not enforceable as to two or more roads.

8. The state earnings are made known to a certainty, concerning which the experts on both sides agree. And whether in earning them the company gains a profit, or sustains a loss, is dependent upon the expense in making such earnings. Some of these expenses can be definitely specified, but others, like maintenance of way, sal-
350 aries of all officers including ticket agents, handlers of freight, terminal expenses, compensation of many laborers, and other

things, are all occasioned for carrying both freights and passengers, state and interstate and miscellaneous of each. And herein is the problem how to make the apportionment.

The track mile, or train or car mile does not furnish the solution, because everyone agrees that neither of those methods will do, and no one of the experts or counsel on either side asks for such a solution. Therefore there is and can be but one of two methods adopted. Neither can be relied upon if mathematical precision is demanded. But the one more nearly correct and satisfactory, is the one to be adopted. And that is what is done in litigation concerning injuries and death; the age, earning power, loss of time, can be fixed, some with certainty. How many years the party had before him is fixed by mortality tables, wholly unreliable as to the individual, but fairly certain as to the average.

In taking property under the power of eminent domain, we know the assessed value, the amount of taxes, the rents, and maintenance. Some or all these elements are put in evidence, while all other is matter of opinion, concerning which witnesses and jurors differ. And so it is in most litigation.

9. The theory to now recognize must be either the proportion of earnings, state and interstate, or ton and passenger mile.

That it costs more to carry either freight or passengers proportionately for a short than a long haul, is undoubtedly true, although all the elements are not more expensive. Local trains generally have poorer and older and cheaper cars and locomotives. But their speed is greater between stations. There are many stops. They carry proportionately much greater dead weight. They do much switching, and there are many delays. Their crews are paid more proportionately to distance and what is carried. The trains are daylight trains only. With freight the carload and number of cars are much the less, and from station to station grows less, and is largely made up of single parcels, boxes, and individual shipments from as many consignors to as many consignees, first put in one station, and at the end of the trip into another station by the company. Usually there are two terminals, comprising an enormous amount of the investments and expenses of the company. The local train is seldom loaded to the capacity of the engine, to the loss of much of the investment and expense. The clerk hire, selling tickets, issuing bills of lading, making expense accounts, and auditing and making records, are attended with like expense for the small and the large items. Many stations would be done away with but for local business.

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In nearly every instance enumerated, as to the interstate, which includes trans-state, the reverse is true, although much magnified in my opinion as to terminals, and particularly as to trans-state, because in my judgment some of the interstate business has two terminal expenses within the state. The two gateways in Missouri through the one or the other of which a large percentage of business both interstate and trans-state passes, are Kansas City and St. Louis. And at both of those places the investments are very large, and of course whether owned or rented, the expense is practically the same. But

these terminals are for both. And while I believe the terminal expenses at St. Joseph, Kansas City and St. Louis as to trans-state business is minimized, I do not agree with the experts who claimed that there are none of those expenses. Their cross examination shows this to be a mistake.

But from the great weight of the testimony, it can well be said that the ton mile is not reliable, and the revenue is more nearly correct, as showing that it costs more by twenty-five per cent. to carry passengers, and fifty per cent. to carry freight locally than it does when interstate. Generally speaking this is undoubtedly true. There are exceptions, one of which is shown by the Burlington with its three roads from St. Joseph, the one to Villisca, Iowa, another to Creston, Iowa, and a third to Chariton, Iowa. They are all interstate roads, each with two terminals, but each operating only local and daylight trains. The Wabash illustrates this with roads across the arbitrary state line between Missouri and Iowa. And there are other
352 illustrations, but less noticeable, in the testimony.

But all these are exceptions and the testimony establishes the rule as stated.

The Missouri Legislature has recognized the proposition in all of its rate statutes, and particularly in the statutes now assailed, that it costs more per mile for a short than a long haul.

See Act approved April 14, 1905; and the Act of April 15, 1905, covered by the original bills herein. The passenger rate statute under consideration fixes a two cent fare for all trunk lines, and four cents per mile for a road less than forty-five miles in length.

The freight rate statute under consideration, in every schedule recognizes the principle that proportionately there should be more charged for a short than a long haul. For instance, Class D allows a charge of five cents per hundred for carload lots for the first twenty-five miles, and one half cent for the second and additional twenty-five miles.

And commencing with the statute of Pennsylvania of 1846 chartering the Pennsylvania road, to the present time, every statute upon the subject fixing freight rates, and many of them fixing passenger fares, recognizes this principle. So that while it is a legislative function to fix rates, we have innumerable legislative recognitions of the greater cost for weight per mile for a shorter than a longer haul, and in some instances as to passengers. And no state has so recognized this to a greater extent than has the Missouri Legislature.

And the courts passing upon the question, have invariably recognized this as being so, and that the revenue theory is the correct one as against the ton mile.

This was so recognized by the Supreme Court of Pennsylvania in case of Railroad v. Pennsylvania County, 68 Atl. Rep. 677, but not discussed.

In R. R. Co. v. Tomkins, 90 Fed. 363, Judge Carland, of the South Dakota District, in passing on the statutes of that state, said:
353 "This Court believes that it is fair and just to first ascertain what per cent of the total gross earnings in any one year the total local earnings are for that year, and having ascertained

that per cent. to take the same per cent. of the total value of the property as a fair value upon which to fix local earnings."

The decree was reversed, and although an equity case, remanded because of a failure to make a material finding. (176 U. S. 167.) The same case under the title of R. R. Co. v. Smith, 110 Fed. 473, on final hearing resulted in a decree enjoining the rates, and the question of expenses was arrived at by the extra cost and on the revenue theory.

The case of R. R. Co. v. Keyes, 91 Fed. 77, is an opinion by District Judge Amidon, concurred in by Circuit Judge Thayer, enjoining North Dakota statutory rates. The argument of the opinion condemns the ton mile theory, and adopts the revenue theory. The criticism of the case is, that conditions in sparsely settled North Dakota are not like those in this state. But the question of which theory was the more accurate for computation, was fully covered, and the ton mile was condemned.

In re Arkansas R. R. Cases, (163 Fed. 141) decided but a few months since by Judge Van Devanter of this Circuit, a temporary injunction was issued against the enforcement of the Arkansas statutory freight and two cent passenger rates. And in most respects the State of Arkansas with reference to rates is like that of Missouri, especially the south half of Missouri. Judge Van Devanter in discussing this question, said:

"Other standards are suggested, but the proofs indicate that none of them is as satisfactory or accurate as is the difference in cost in its relation to the revenue."

And the proofs, including statistics and tables and some of the same expert witnesses on each side, were the same as in the cases at bar.

The great case from Nebraska of Smyth v. Ames was heard on the Circuit by Justice Brewer on oral testimony, as the cases at bar have been heard. The entire discussion of the question by
354 Justice Brewer in a lengthy opinion *in* on the extra cost and revenue theory, entirely ignoring the ton mile theory. That case resulted in the state statutory freights being enjoined by Justice Brewer, District Judge Dundy concurring.

The case was carried to the Supreme Court, (169 U. S. 467,) resulting in an affirmance of Justice Brewer's decree. The opinion of the Supreme Court by Justice Harlan is exhaustive, and the tables used by him to show the facts, and the entire argument *is* with reference to the extra cost and revenue theory, utterly ignoring the ton mile theory.

Recurring to the Tomkins case, (90 Fed. 363) above alluded to, that case was reversed by the Supreme Court, (176 U. S. 167) and the question of fact was only discussed from the revenue theory. The reversal was only because the lower court recited that it was unable to ascertain what was the actual cost of earning the local earnings for certain years. But as the lower court on the first hearing proceeded on the extra cost and revenue theory, and as that was what was discussed by the Supreme Court, and under the Mandate the case went to decree, (110 Fed. 447,) on the revenue theory, I

am convinced that the Supreme Court for the guidance of trial courts has adopted the revenue theory as the one more just and equitable both to the patrons of the road and to the companies.

So that we have the Supreme Court in the two cases recognizing the revenue theory. Two Circuit Judges of this Circuit have so held. And the same holdings have been made by at least three District Judges, and the Supreme Court of Pennsylvania impliedly, although the argument in that opinion is not strengthened by reason of a statement as to the measure of proof, concerning which the minority opinions without doubt are correct.

As an argument against the revenue theory, and for the ton mile theory, no court has spoken in so far as counsel on both sides and I are advised. In some phases this is a question of fact, or logic, or argument, or opinion, partaking of all. But so many eminent courts have thus spoken, even though not a question of law, and even though the traffic in the states differ, yet such opinions tend most strongly to create an undoubted belief that the cost for
355 carrying both passengers and freight locally is greater proportionately than for doing a long or interstate business, and that the revenue theory is the only one to apportion the cost of each business.

The Wisconsin Railroad Commission made an exhaustive and thorough investigation of these questions two years since. Evidence of both sides was heard. Experts interested, and those not interested, testified. Many months of time were given to the hearing and in reaching conclusions. A valued report was the result. The findings and conclusions were:

1. The cost of carrying local and state freight is greater than for carrying interstate freight and passengers.

2. That this extra cost must be considered, and then take the gross earnings as the basis upon which to allot expenses between the state and interstate business.

3. That less than two and one half cents per mile for local or state passengers was not remunerative in the State of Wisconsin.

10. When the statutes in question were enacted, it was believed by many that by reducing the fare, there would be much more travel. For a month or so this proved to be true. But with the novelty gone, the testimony shows that the increase has been less than three per cent. and more nearly one per cent.

It was likewise believed by many that with the abolition of passes and other forms of free transportation, that expenses would be lessened and receipts increased. Ministers sometimes received free transportation, but generally at half rates. Many lawyers and doctors received passes under guise of retainers for services never performed. Bankers received them under the claim that it was compensation for signing bonds, and cashing Chicago and St. Louis exchange. Politicians demanded, extorted, and received them for supposed influence. Officials received them as a courtesy. Many newspaper concerns received them, from the proprietor and editor-in-chief down to the typesetter, (relatives included,) under the pretense that it was an exercise of liberty of contract, for which the

newspaper published the arrival and departure of trains, with
356 an occasional local and sometimes abbreviated plate matter.
To receive them was often followed by charges of corruption and to refuse them, by charges of demagogy. Every person conceded it to be a wrong system, and most people were advocates for its abolition, except as to the class to which he belonged. But it was abolished, and does not longer exist, and the evidence shows that as to state earnings, the passenger revenue is increased by reason thereof less than one per cent.

11. This leaves but one question for decision, and that question largely one of fact. The question is whether the traffic wholly within the State of Missouri generally referred to in the evidence as local traffic, can be carried under the freight rate statute of 1907 and the passenger fare statute of 1907 at such profit as will give a reasonable return after paying expenses upon the investment, or whether such traffic is carried at a loss or less than such reasonable profit.

Thousands of pages of testimony, taking weeks of time, have been filed. This testimony was orally presented, part to the Master, and part to the Court, accompanied with volumes of statements, reports, schedules and tables. Every phase of every question of both debit and credit has been worked out, tabulated, and filed. These exhibits are the result of something like one year of work by the expert accountants representing both sides, as a result of their examinations of train reports, waybills, auditors' books, and of the accounts of the passenger and traffic departments of the several roads. This work required not only much time, but energy, and patience, and learning, and great skill. But each side had accountants of the highest character, and possessing all of those qualifications. The four accountants, Mr. Peabody and Mr. Johnson representing the railway companies, and Mr. Taliaferro and Mr. Hamilton representing the State, impressed me after hearing them testify and being in consultation with them for ten days after the cases were submitted, that the sole purpose of their work was to exhibit the truth,
differing only as to extra cost, and that difference of extra
357 cost largely confined to the local passenger traffic, and differing as to the theory as to how the expenses between local and interstate traffic within the state should be divided. Aside from those two questions there is not the slightest variance between the testimony of the experts upon the two sides. During the ten days following the submission of the cases, they and the Court being alone, at the request of the Court they prepared a statement in each of the nine cases submitted, which have been ordered filed. To each of the nine statements is appended a certificate showing the time covered, and that such statement correctly shows the results of the various assumptions set forth therein, which certificates were signed by the four expert accountants. Seldom, if ever, is a Court under greater obligations to expert accountants representing the two sides, than the Court and all parties, the railroads and the public, owe these four gentlemen. Usually experts representing different sides do not agree to anything. Here experts representing the different

sides agree to everything pertaining to the accounting, the differences only arising as to the basis.

The Court is likewise much indebted to counsel on both sides, who for four days argued these cases with a fairness, and wealth of learning and eloquence seldom displayed at the bar. And now after the fullest investigation of the record, the Court has reached the conclusion that upon this question of fact the statutory rates fixed by either and both statutes are not remunerative. And it only remains for the Court to give the reasons for such conclusion.

And in giving these reasons, clearness is added by eliminating those things so clearly established by the evidence, or so nearly conceded in matters of law as not to be debatable.

1st. The unquestioned and undoubted rule is that there is a presumption both of fact and of law in favor of the validity of every legislative enactment. The railway companies have the burden of removing this presumption, and showing that the statute clearly, or as some Courts say, palpably, and others say, beyond a
358 reasonable doubt, that the statute is invalid. In these cases the Court has recognized this rule. The authorities upon this question form a long and unbroken line, with the single exception of the majority opinion in the Pennsylvania case decided a year ago (68 Atl. Rep. 676). And that one authority is not persuasive.

2nd. All testimony and argument bearing upon the question as to what consideration the Legislature of Missouri gave to these enactments, is utterly immaterial. Much was said in argument as to the message of Governor Hughes of New York two years ago in declining to approve the two cent fare statute of that state. Governor Hughes had the moral courage to veto a measure of popular favor because as he believed the question had not been fully considered. But the relations of a governor to proposed legislation, and those of a Court to legislation consummated, are entirely different.

3rd. Most of laymen and many lawyers believe that the question is whether the railway company as a system is earning sufficient revenue upon the value of the property of the system. They believe that if the Burlington, Santa Fe, Wabash, or any other railroad system is earning such money as will pay all charges and expenses including taxes and interest, with reasonable dividends to the stockholders, that state rates for state business must stand. Of course no one believes this who has given the slightest attention to the question. That precise question was before, and was decided by Justice Brewer, (64 Fed. Rep. 165,) and affirmed by the Supreme Court in the Nebraska case of Smyth v. Ames, (169 U. S. 466). The only question is as to Missouri rates, less expenses properly charged against the same. And if this balance does not leave sufficient to pay a reasonable return, the law is invalid. And if the railroad system of any company is earning more than a reasonable return by reason of interstate rates, which affect the people many times more than local rates, and if such interstate rates are too high, Congress either acting alone or through a Commission must make the corrections.

359 The Supreme Court during the present year in the case of City of New York v. Consolidated Gas Company of New York (211, U. S. —) decided that six per cent was fair and right to be given to the owners upon the true valuation. My opinion is that while a gas plant is in some respects different from a railroad, that a railroad property, properly built, and properly managed, should over and above expenses make a return of six per cent per annum. And considering all the evidence, the evidence fairly shows that all of these roads were properly and economically built and are being properly and economically managed, and that after paying the expenses for maintenance and operation, that there is less than six per cent. of returns, and not more than three per cent. upon any of them and as to some of them a deficit, taking the property as above stated within the State of Missouri at its fair valuation. And this is so without reference to bonds, because in no case do the bonds bear six per cent interest. But taking the bonds into consideration, there is still not to exceed three per cent. returns, and many cases a deficit after considering all debits and credits, upon the true valuation for the state business. There is no evidence that any of the existing bonds were improperly issued either as to amounts or rates of interest. In fixing the value the Court has considered the evidence of witnesses as to the stocks and bonds outstanding, and the Court has considered the evidence of the fact that the Missouri State Board for taxing purposes has valued these properties. Of course those findings are not binding nor conclusive, but they are persuasive. But independently of stocks and bonds, and independently of what the State Board has valued these properties for taxing purposes, the evidence shows the valuations to be as recited in the findings of fact herewith filed, and to which reference will be made in the decrees.

It is absolutely necessary that many trains both passenger and freight do both a local and interstate business. Even the fast trains stopping at but few stations in the state carry state passengers
360 between such stations. And the same is true as to freight trains carrying freight both in carload and less than carload lots.

The valuation of the roads has been fixed by the Court as shown by the findings of fact. The entire state and interstate earnings of each of the roads within the state is known and fixed to a certainty the expenses are known and fixed. To apportion these expenses, must be done according to one of the two theories, and the correct theory is that according to revenue. One theory or other must be applied to both freight and passenger expenses, and the Court should not adopt the one theory as to part, and the other theory as to another. The one theory is helpful to the one side, and the other theory helpful to the other side, the one theory to the one side in freight, and the other theory to the other side in passenger. But an arbitrary splitting of theories is illogical and unfair, and cannot be recognized. The court has adopted the revenue theory because a great number of the best railroad experts of the country, against a very limited number to the contrary have so testi-

fied. Every Court that has ever had this question before it in so far as I am advised by the briefs of counsel and my own independent investigation has so held in the cases hereinbefore cited of the Supreme Court of the United States; in the two cases, by two Circuit Judges of this Circuit; by three District Judges of this Circuit, and by the Supreme Court of Florida, State v. Atlantic Coast Line (37 So. Rep. 657). And Beale & Wyman on Railroad Rates Regulation, Sec. 466 announces such as being the correct rule. The values of the property within the state have been fixed by the Court. The entire earnings within the state, interstate and state, freight, passenger, and miscellaneous of each, have been fixed. The entire expense is known, including the extra cost of each. To ascertain whether the result is a profit, and if so what per cent., or a loss, is but a problem of primary arithmetic, as is shown by Judge Van Devanter in Arkansas Rate Cases (163 Fed. Rep. 141). There are other methods equally simple, the resultant figures of course being the same. These computations show as to the commodities covered by the freight rate statute of 1907, that two roads, the Hannibal &
St. Louis and the Burlington, allowing nothing for extra cost,
361 there is a deficit, and with all other companies less than two per cent. But with the extra cost added, the deficit for the two companies is much greater, and the other companies show a deficit.

The passenger earnings under the two cent fare law of 1907, allowing nothing for extra cost over interstate business, give no return whatever to the Rock Island, St. Louis & Hannibal, Kansas City, Clinton & Springfield, and the Great Western. The other companies will have the following: The St. Louis & San Francisco between three and four per cent; the Santa Fe between four and five per cent; The Kansas City Southern a small fraction over two per cent; the M. K. & T. between two and three per cent; the Burlington between three and four per cent. But all this is arrived at by allowing no extra cost of service. But to add the extra cost for freight and passenger, there are no earnings over expenses. This is confiscation under the Constitution.

It being a legislative act, and not a judicial one, this Court cannot fix rates. If it could, two and one-half cent passenger rates would be fixed for the stronger roads, and three for the others. But that is for the legislature acting itself with experts, such as the State employed in these cases, or through a Commission with like assistance.

In view of General Equity Rules prohibiting findings of fact, and other matters from being inserted in decrees, this opinion has been extended. And to further show how the court has considered the cases, and the various questions of fact covered by the voluminous evidence, findings of fact have been made and signed, which will accompany this opinion.

Long and laborious as the work for the Court has been, I am of the opinion that the cases have been expedited by hearing the oral testimony as provided by General Equity Rule 67. It gave the Court a much better insight into the intricacies of the cases, and with a much better knowledge of the cases than could be gained by

hearing exceptions to a Master's report. And I am fully
362 compensated by the belief that I have worked out the correct conclusions and with the knowledge that if I am in error, either as to fact or law, that the cases can be speedily heard de novo by the Supreme Court of the United States. Because I feel in all cases, and in these cases more than ever before, as Judge Sanborn said in Boatmens Bank v. Fritzlen, (135 Fed. Rep. 650, 655)

"Every conscientious judge, every thoughtful man, upon whom is laid the grave responsibility and the heavy burden of determining the rights of his fellows, rejoices in the thought, wherever such is the case, that his decision may be reviewed, and that, if erroneous, it will not work irreparable injustice to him whom he deems it his duty to defeat."

The decrees will be for the complainants. Each party will pay the costs by such party made, except the compensation of the Master and stenographer. The half of those will be paid by complainants, and the other half by respondents. The reservation clause usual in such cases will be in the decrees.

Kansas City, Missouri, March 8th, 1909.

363 Afterwards, to wit, on the 17th day of April, 1909, a Supplemental Opinion was filed. Said Opinion is in words and figures as follows:

In the Circuit Court of the United States, Western District of Missouri, Western Division.

No. 2988. Equity.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Complainant,
vs.
HERBERT S. HADLEY et al., Respondents.

And Equity Cases Nos. 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3006.

Supplemental Opinion.

SMITH MCPHERSON, *Judge:*

These cases are pending on a motion to modify the decrees and opinion filed March 8th, 1909.

1. The costs were taxed, the one-half to the railway companies, and the one-half to the state officers. The company being successful, it is contended that the taxable costs aggregating about eighteen thousand dollars should all be adjudged against the state officers.

In actions at law, in the absence of a tender or statutory offer to confess judgment, the costs follow the judgment. In equity cases such is the general rule, but not the invariable one. The award as to costs is discretionary.

Two things influenced the court in dividing the costs herein.

First. Defendants are officials, and as officials are representatives.

They have no personal interest in the litigation. This of itself is not enough to avoid the costs, but it is to be considered. It will be presumed that the legislature will appropriate a sufficient amount to protect these officers. But this is not always done. The last legislature appropriated $40,000.00 for these cases, which was but two thirds enough for the two years. The Master in Chancery and the lady stenographer gave a great deal of time, followed by very large, but justly owing bills, the one-half of which has been paid by the railways, and by the state nothing with the appropriation ex-
364 hausted. Whether the other half is paid all depends upon what the legislature does.

Second. The more sufficient reason for dividing the costs is because of the extravagantly enormous record made in the cases. The Master gave many weeks to taking evidence, and many more weeks were given by the court in taking evidence. Both the Master and the Court were powerless to abbreviate the record, because the Supreme Court in the case of Blease vs. Garlington, 92 U. S., 1, and the Circuit Court of Appeals for this Circuit in case of Schubert vs. Woodward, 167 Fed. Rep. 47, 52, have held that Trial Courts must receive in equity cases, all evidence offered that is germane to the issues. I complained, and in effect gave warning many times to the parties, but without avail because of the prolixity of the record. Something like 15,000 pages of evidence were taken, when one-third would have been as strong a presentation of either side. Courts should impose penalties for this, and the only penalty is by way of costs. Both sides were at fault, and both sides should bear the burden. It does not follow that such a precedent will be one to plague. It is not a precedent to be followed except in cases where it ought to be followed.

2. Complaint is made because of the recital in my opinion that,

"It being a legislative act, and not a judicial one, this court cannot fix rates. It it could, two and one-half cent passenger rates would be fixed for the stronger roads, and three for the others. But that is for the legislature acting itself with experts, such as the state employed in these cases, or through a commission with like assistance."

My statement that "It being a legislative act, and not a judicial one, this court cannot fix rates," is not controverted by anyone. This being so, as of course, what I said as above is obiter dictum. But because it is dictum, is no reason whatever for not saying it, and still less a reason for now eliminating it from my opinion. The greater part of one of the greatest opinions ever written by the great Chief Justice (Marbury vs. Madison), was dictum. But even if it were possible, who would dare to mutilate that opinion? But two
365 years since there were published two very large volumes wholly covering dictum only of the United States Supreme Court. Those dicta were and are binding on no one, but they contain much of the cream of our jurisprudence. This dictum of mine is binding on no one. It is my opinion, and will stand as of value, or of no value as the profession and informed laymen fix the value thereon. I believed it proper to say that the strong roads should have two and one-half cents per passenger per mile, and the weaker

roads three cents. I could have fairly stated that the St. Louis and Hannibal, and the Kansas City, Clinton & Springfield Railroads should have four cents or more per passenger mile.

I still adhere to those views, and entertaining them, I know of no reason for not stating them, with reasons for believing it was my duty to state them. Passengers, like consumers, have rights. One of those rights is to have fares fixed reasonably low. But the term reasonable is a comparative one. It must be in proportion to what it is worth, and the better the service, the more it is worth. And the public is entitled to have, with the right to demand, efficient service, provided always such is paid for. Much in argument was said by counsel on both sides as if an arbitrary flat rate is all that is involved, regardless of service and regardless of all other things. Whether the trains are expensive or inexpensive, daylight or night trains, through or local trains, main line or branch trains, roads through the hills of central Missouri, or the Ozarks, or over the prairies, and whether the trains carry few or many passengers, are matters largely passed over as if of no importance. To me they seem of great importance. So it is as to the greatly increased cost of materials compared with ten years ago. The average fare paid per year, aside from the low excursion rates, is less than six dollars per year, commercial travelers excepted. To reduce that to four dollars, thereby saving two dollars, is of course of importance. So are other matters of importance. Aside from having efficient service to be paid for at remunerative rates, the laboring men, the employés, have rights. They have the right to be well paid for their work, in day time and night time, sunshine and storm,
during the excessive heat of the summer and the rigors of
366 winter. Their hazardous and most dangerous service entitles
them to remunerative compensation, which they cannot have with meagre earnings of the roads. Evidences of humanity and kindly feeling for their fellow men need not be wholly displayed toward the man who pay- six dollars per year for passenger fares. A kindlier disposition would suggest an equitable division of sympathy. Thousands and thousands of them have already been "let out" because of decreased earnings, and more are to follow, with diminished compensation for those from necessity retained. What is the truthful answer to make these men, and who is to make this answer? It is doubtful if the legislature thought this out. I decline to modify my opinion as respects this.

3. It is contended that the court was in error in its original opinion in that the penalties of the statutes render them void.

Whether rates prescribed by statutes are valid or invalid, is a judicial question, and the legislature cannot prohibit the courts from passing thereon. This was so stated in the Minnesota Milk case, 134 U. S. And this cannot be done indirectly, by imposing such penalties as to terrorize the company, its officers and agents so that they do not dare to litigate the question. This was so held in ex parte Young but a year ago.

This question received but little attention from any of the counsel or the court, and was but briefly discussed by the court in the opinion.

In the Consolidated Gas case in 146 Fed. Rep., 150, Circuit Judge

Lacombe held that a penalty of $1,000.00 for each charge for gas in excess of the statutory or commission rate was prohibitive and a denial of the right to go into the courts. And on the final hearing of the same case in 157 Fed. Rep., 849, 881, a like holding is made. And in the same case on appeal, the Supreme Court held a year ago that the penalties were so excessive as to be void.

The discussion by Justice Brewer speaking for the court, in the case of Cotting vs. Kansas City Stock Yards, 183 U. S. 79, 99, is to the same effect, although the question was not decided. And a like discussion, with a like putting the question aside without a decision, is found in the Reagon case in 154 U. S.

367 And in the ex parte Young case, although the penalties were more severe than under the Missouri statutes, the question is at rest. The sole question is—Can a party be allowed to litigate a disputed question of fact as to property rights, without confiscation of all its property, and all of its agents being sent to jail, if the case is lost? Surely he can. Upon reflection and with much additional consideration, the holding now is that the section imposing penalties is void.

But this is largely an academic question, for the reason that the penalty section is easily separated from the main features of the statute. And I need not discuss the proposition that when separable, the void section does not render the entire statute void.

4. These cases as to freight were brought four years ago. Two years ago supplemental bills were filed, bringing forward the new freight rate statute, and the passenger rate statute. Upon a hearing, by agreement of counsel on both sides, a temporary injunction was issued against the enforcement of the freight rate statute. The railways asked for a temporary injunction against the enforcement of the passenger rate statute. The Attorney General and his associates contested this, and were successful to the extent that the court ordered an observance of the statute for some months, until information from actual tests could be made. So that from the very inception of the case, it has been contended on the one side that the statute is invalid, and on the other side that the statute is valid. It therefore follows that this court has had jurisdiction for four years over all the parties, and over the entire subject matter of state earnings.

It is clear that this court having such jurisdiction should retain it over all the parties, and the subject matter, to the end that the decrees hereafter may be enlarged, or modified, as varying circumstances and the acts of the parties may require. Therefore the decrees should be so changed as to recite such reservations.

Kansas City, Missouri, April 17th, 1909.

368 UNITED STATES OF AMERICA, *sct:*

I, Adelaide Utter, Clerk of the Circuit Court of the United States for the Western Division of the Western District of Missouri, do hereby certify that the above and foregoing is a full, true and complete copy of the record, assignments of errors and all proceedings in the cause wherein Chicago, Milwaukee & St. Paul Railway Company

is complainant and John A. Knott, et al., are defendants, on the appeal of the defendants and the cross-appeal of the complainant, as required by the stipulation of parties on file in said cause and set out on pages 305 and 306 supra.

Witness my hand as clerk and the seal of said Court. Done at office in Kansas City, Missouri, this first day of May, A. D. 1911.

[Seal of the United States Circuit Court for the Western District of Missouri, Western Division.]

ADELAIDE UTTER, *Clerk.*

Endorsed on cover: File No. 22,778. W. Missouri C. C. U. S. Term No. 702. John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad and Warehouse Commissioners, and Elliott W. Major, Attorney General of the State of Missouri, appellants, vs. The Chicago, Milwaukee & St. Paul Railway Company. File No. 22,779. Term No. 703. The Chicago, Milwaukee & St. Paul Railway Company, appellant, vs. John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad and Warehouse Commissioners, and Elliott W. Major, Attorney General of the State of Missouri. Filed June 26, 1911. File Nos. 22,778 & 22,779.

(22,780 and 22,781.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 704.

JOHN A. KNOTT, H. R. OGLESBY, AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

vs.

THE CHICAGO & ALTON RAILWAY COMPANY.

No. 705.

THE CHICAGO & ALTON RAILWAY COMPANY, APPELLANT,

vs.

JOHN A. KNOTT, H. R. OGLESBY, AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY GENERAL OF THE STATE OF MISSOURI.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

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a *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Chicago and Alton Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at the City of Washington, within thirty days from the date of this writ, pursuant to an appeal duly allowed by the Circuit Court of the United States for the Western Division of the Western District of Missouri, and filed in the clerk's office of said court on the 6th day of March, A. D. 1911, in a cause wherein John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad and Warehouse Commissioners, and Elliott W. Major, Attorney General of the State of Missouri, are appellants, and you are appellee, to show cause, if any, why the amended final decree rendered against the said appellants, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Smith McPherson, Judge of the Circuit Court of the United States for the Western Division of the Western District of Missouri, this 6th day of March, A. D. 1911.

SMITH McPHERSON, *Judge.*

THE UNITED STATES OF AMERICA,
Western District of Missouri, ss:

I hereby acknowledge due service of the above citation this 6th day of March, A. D. 1911.

FRANK HAGERMAN,
Solicitor for the Chicago and Alton Railway Company, Appellee.

b [Endorsed:] 3006. C. & A. R. R. Co. vs. John A. Knott et al. Citation. Filed March 6, 1911. Adelaide Utter, Clerk.

c In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3006.

CHICAGO & ALTON RAILROAD COMPANY, Complainant,
vs.
JOHN A. KNOTT, H. R. OGLESBY, and FRANK A. WIGHTMAN, Railroad Commissioners, et al., Defendants.

The President of the United States to all the defendants of record in above entitled case:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the city of Washington, District

of Columbia, within thirty days from the date of this writ, pursuant to an appeal duly allowed by the circuit court of the United States for the western division of the western district of Missouri, on March 6, 1911, as a cross appeal in a case where the Chicago & Alton Railroad Company is cross appellant and you are the cross appellees, and show cause, if any, why the amended final decree rendered against the said appellant as in the said appeal mentioned should not be granted, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Smith McPherson, Judge of the Circuit Court of the United States for the Western Division of the Western District of Missouri, this March 6, 1911.

SMITH McPHERSON, *Judge.*

Due service of above citation accepted this March 6, 1911.

ELLIOTT W. MAJOR,
Attorney General;
GEN. JOHN M. ATKINSON,
Ass't Att'y General;
SANFORD B. LADD,
Solicitors for Appellees and Defendants in said Cause.

[Endorsed:] No. 3006. C. & A. R. R. Co. v. John A. Knott et al. Citation. Filed March 6, 1911. Adelaide Utter, Clerk.

d

1 UNITED STATES OF AMERICA, *sct:*

Be it remembered that heretofore, to-wit, on the 23rd day of June, 1905, a Bill of Complaint was filed in the office of the Clerk of the Circuit Court of the United States for the Western Division of the Western District of Missouri in the cause wherein Chicago & Alton Railway Company is complainant and John A. Knott, et al., are defendants.

Said Bill of Complaint is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

THE CHICAGO & ALTON RAILWAY COMPANY, Complainant,

vs.

JOHN A. KNOTT, H. R. OGLESBY, and FRANK A. WIGHTMAN, Railroad Commissioners of the State of Missouri; Herbert S. Hadley, Attorney General of the State of Missouri; William T. Kemper, and Alexander McKenzie, Defendants.

Bill of Complaint.

To the Honorable the Judges of the Circuit Court aforesaid:

Your orator, the Chicago & Alton Railway Company, brings this, its bill of complaint, against each of the above named defendants, and thereupon avers:

I.

Your orator, the Chicago & Alton Railway Company, is a railway corporation, organized and existing under the laws of Illinois, with its chief office therein and a citizen and resident thereof, being authorized to do business in the State of Missouri. It is, with its railroad, engaged in state and interstate commerce as lessee in
2 operating lines of railway in Missouri and other states. Of the said lines, the following are, and have for a long time, been owned and operated by your orator in the State of Missouri:

A line of railroad from Louisiana to Kansas City, a distance of 213½ miles, and from Mexico to South Cedar City, a distance of 50 miles, making a total of 263½ miles of main line track, more or less.

II.

This cause arises under the constitution and laws of the United States, for that it seeks to enjoin the enforcement and adoption, as against your orator, of the provisions, requirements and prohibitions in the act of the legislature of Missouri mentioned in paragraph VII hereof (hereinafter called the Act of 1905); said act being unconstitutional, violative of the provisions of the Constitution of the United States and the amendments thereto, and contrary to the laws of the United States, all as hereinafter more particularly stated. The matter and amount in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

III.

The defendants, John A. Knott, Joseph P. Rice and Frank A. Wightman, constitute the duly elected and qualified Board of Railroad Commissioners of the State of Missouri, and are citizens and residents respectively of Marion County, City of St. Louis,
3 and Barry County, therein, their statutory official residence being in Cole County therein. The defendant, Herbert S. Hadley, is Attorney General of the State of Missouri, and is a citizen and resident of Cole County therein. Each of said parties is by the law of which the Act of 1905 is a part, required to do and perform the special duties hereinafter mentioned.

IV.

Defendants, William T. Kemper and Alexander McKenzie, each of whom is a citizen and resident respectively, of the County of Jackson, State of Missouri, are herein designated as shippers, each being a person engaged in shipping over your orator's road and other roads in the state, to and from points therein, the commodities, the rates of which are attempted to be limited by the said Act of 1905. These defendants represent a class of shippers so numerous that it is impracticable to attempt to join them all, and the above named defendants are made parties hereto for the purpose of determining the rights as against your orator of all shippers under the said Act of 1905.

V.

Article 4, of Chapter 12, of the Revised Statutes of Missouri, 1899, of which the Act of 1905 has become a part, made provision for the classification of railroads, and freights, and provision for maximum rates. Sections 1191, 1192 and 1193 thereof, provide as follows:

SECTION 1191. Roads Classified.—All railroads in the State of Missouri are hereby divided into three classes, to be known
4 as class A, class B, and class C. Class A shall include all through or trunk line railroads. Class B shall include all of the branch roads owned, leased or occupied by such through or trunk line railroad companies or corporations. Class C shall include all other railroads, or parts of railroads, owned, leased or occupied, or which may hereafter be owned, leased or occupied in this state, either wholly or in part.

SECTION 1192. Passenger Charges Regulated.—Any individual, company or corporation owning, operating, managing or leasing any railroad or part of a railroad in this state, in the several classifications as herein prescribed, shall be limited to a compensation per mile for the transportation of any person with ordinary baggage, not exceeding one hundred pounds in weight, as follows: In class A, not exceeding three cents per mile, and in classes B and C not exceeding four cents per mile; Provided, that no such individual, company or corporation shall charge, demand or receive any greater compensation per mile for the transportation of children of the age of twelve years or under, than one-half of the rate above prescribed; and provided further, that the rates for transportation herein prescribed may be reduced, as hereinafter provided.

SECTION 1193. Freight Classified.—All freights hereafter transported upon any railroad, or part of a railroad, in this state are hereby divided into four general classes, to be designated as first, second, third and fourth classes, and into seven special classes, to be designated as class D, E, F, G, H, I and J. Class D shall comprise all grain in carloads. Class E shall comprise flour in lots of fifty barrels or more, and lime in lots of twenty-four barrels or more. Class F shall comprise salt in lots of sixty barrels or more, and cement, water lime and stucco in lots of twenty-four barrels or more. Class G shall comprise lumber, lath and shingles, in carloads. Class H shall comprise live stock, in carloads. Class I shall comprise agricultural implements, furniture and wagons. Class J shall comprise coal, brick, sand, stone, railroad ties and cord wood, and all heavy fourth-class articles, in carloads; and in addition to the several articles in the said special classes, shall be added other articles as and in the manner hereinafter prescribed, except in classes D, E, G and H, and all articles not before enumerated, or subsequently set into said classes as hereinafter provided, shall be placed
5 in and belong to the four general classes, to be classified by the railroad commissioners hereinafter to be provided.

Section 1194 fixed the maximum rates for the seven special classes of freight designated as classes D, E, F, G, H, I and J, respectively. The statutes of the state also provide for the election and qualification of the railroad commissioners aforesaid, and prescribed their special

duties, among which special duties in relation to the adoption and enforcement of the said Act of 1905 are these: To require to be posted by each railroad company in the state in its depot or railroad station and to be filed in the office of the railroad commissioners, a schedule of rates to be charged, which in no event must exceed the maximum rates at any time fixed by law, nor those maximum rates fixed by the Act of 1905, which rates so shown by the schedules so filed with the railroad commissioners cannot be advanced except after ten days' public notice, plainly stating the changes proposed to be made in the schedule, and the time when said changes will go into effect; to require to be likewise filed and published all joint tariff arrangements with other common carriers; to see that all such schedules of rates are observed by all common carriers; if and when the common carrier shall neglect or refuse for thirty days to file or publish its schedule as aforesaid, as commissioners to make out and print such schedule for such carrier, delivering to it a copy thereof, which shall be likewise posted in the depots and stations; to enforce statutory provisions imposing severe penalties for a failure to publish and file said schedule; to hear all complaints made by any person for a violation of any of said provisions of law, as well as to institute on its own motion any such complaint. The statute of the state also especially provides for the adoption and enforcement of the provisions of the Act of 1905 by requiring the prosecuting attorney of each county to prosecute any carrier violating the provisions of the law aforesaid, whenever directed by the railroad commission-
6 ers, receiving for his services compensation equal to the amount allowed by law on forfeited recognizances, and the attorney general is required to assist in such prosecution and to prosecute other cases whenever directed by the railroad commissioners.

VI.

The legislature of the State of Missouri in 1903 passed an act herein called the act of 1903, reading as follows:

SECTION 1. That chapter 12 of article 4 of the Revised Statutes of Missouri of 1899 be, and the same is hereby amended by adding thereto, two new sections, to be between Sections 1194 and 1195 of this Chapter, to be known as Sections 1194*a* and 1194*b*, providing for the fixing, modifying and enforcing freight rates, as follows:

SECTION 1194*a*. The board of railroad and warehouse commissioners are hereby authorized, empowered and required to fix, maintain and establish just and reasonable freight rates on all classes of freight from, to and between all points and stations upon and along all lines of railroads in this state; and said board is authorized and empowered to reduce, change or modify any and all such freight rates so fixed and established as hereinafter provided. And said board may, of its own motion, and shall, upon the sworn complaint of any shipper, mayor, councilman, alderman or trustee of any city, town or village, first giving five days' written notice to the railroad company affected or complained against, proceed to fix, establish, modify or reduce the freight rates or charges of any such road from, to or between any and all points or stations in Missouri; and any and

all orders fixing, establishing, modifying or reducing any such freight rates or charges shall be the judgment of said board and constitute the legal rates or charges that such railroad company may collect for the transportation of freight from, to and between its
7 stations in Missouri; and said board shall, immediately upon the fixing, establishing, modifying or reducing the freight rates or charges of any railroad company, notify such railroad in writing thereof; and said railroad shall comply with the orders and judgments of said board with reference to such freight rates or charges, within ten days after such notice. And if any railroad fails, refuses or neglects to put the rates so ordered by said board into effect and operation within ten days after notice, the board shall submit a certified copy of its orders to the attorney general of the state, with notice that such railroad (designating the same), has failed to comply therewith. And the attorney general, upon receipt thereof, shall immediately institute suit in the name of said board of railroad and warehouse commissioners against such railroad, in the Supreme Court of the state, by mandamus or other proper remedy to enforce said order of said board.

SECTION 1194*b*. All railroad companies doing business in this state shall, upon the request of the board of railroad and warehouse commissioners furnish to said board copies of all its schedules of freight rates and charges, and all other papers and documents, including bills of lading and contracts for transportation of freight affecting in any way the transportation of freight within, into and from this state. And said board shall have power and authority to examine all officers, agents and employés of said railroad companies, and all other persons, under oath or otherwise, to procure the necessary information, to make just and reasonable freight rates or charges, and to ascertain if the freight rates so fixed by said board are being observed or violated. And said board shall have power to administer oaths, to issue subpœnas for persons and papers, examine witnesses and to enforce the same in like manner as the Circuit Courts of this state. And in the issuance and enforcement of the papers and process above, the jurisdiction shall be co-extensive with the state.

Approved April 6th, 1903.

There was then and there adopted Sections 1194*a* and 1194*b* to become part of Article 4 of Chapter 12 of the Revised Statutes of Missouri, 1899, to be known as Sections 1194*a* and 1194*b* and to be inserted between Sections 1194 and 1195 of the said Revised Statutes.

8 VII.

The legislature, of the State of Missouri, at its session of 905, passed the act herein called the Act of 1905, reading as follows:

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. That section 1194 of the Revised Statutes of Missouri, 1899, concerning the regulation of freight charges, being part of Article IV, of Chapter 12, entitled "Corporations, Private,"

be, and the same is hereby repealed, and the following, to be known as Sections 1194, 1194*a*, 1194*b*, of said Revised Statutes, be enacted in lieu thereof, so that said sections shall be collocated between the existing Sections 1193 and 1195 of said Revised Statutes of 1899.

SECTION 1194. No individual, company or corporation, owning, operating, managing or leasing any railroad, or part of railroad, designated in Section 1191 as in classes A, B, or C shall demand, charge or receive a greater or higher rate for carrying from initial to terminal points in this state articles named in the several classes herein designated, than is hereinafter provided for, namely: Class D, in carloads of 40,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first twenty-five miles and not exceeding one-half cent per hundred pounds for the second 25 miles, or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional 25 miles or fractional part thereof. Class E, in carloads of 24,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first 25 miles, and not exceeding one-half cent per hundred pounds for the second 25 miles, or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional 25 miles or fractional part thereof. Class F, in carloads of 30,000 pounds minimum weight, not exceeding 5 cents per one hundred pounds, for the first 25 miles, and not exceeding one-half cent per hundred pounds for the second 25 miles, or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional 25 miles or fractional part thereof. Class G, in carloads of 30,000 pounds minimum weight, not exceeding 5 cents per one hun-
9 dred pounds for the first 25 miles, and not exceeding one-half cent per hundred pounds for the second 25 miles, or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional 25 miles, or fractional part thereof. Class H, in carloads in common cars, measuring inside 29 feet to and including 30 feet and 6 inches in length (to be known as standard cars) not exceeding $6.00 per carload for the first 25 miles, and not exceeding $3.00 per carload for the second 25 miles, or fractional part thereof, and not exceeding $2.00 per carload for each additional 25 miles, or fractional part thereof, of over 12 miles. For the carriage of any of these articles, comprising class H, in cars of other lengths for the distances above specified, the following percentages of the foregoing rates per carload shall not be exceeded, namely: In cars of length, less than 29 feet, 94 per cent; in cars of length over 30½ to and including 32 feet, 104 per cent; in cars of length over 32 feet to and including 33 feet and 9 inches, 107 per cent; in cars of length over 33 feet and 9 inches to and including 36 feet, 110 per cent; in cars of length over 36 feet to and including 38 feet, 113 per cent; in cars of length over 38 feet to and including 40 feet, 116 per cent; in cars of length over 40 feet, to and including 42 feet, 125 per cent; in cars of length over 42 feet to and including 44 feet, 135 per cent; in cars of length over 44 feet, 140 per cent of the rates herein specified for cars of the standard length of 29 feet to and including 30 feet and 6 inches, shall not be ex-

ceeded. All the foregoing lengths to be taken by inside measurements. Class I, in carload- of 20,000 pounds minimum weight, not exceeding $14.00 per carload for the first 25 miles, and not exceeding $2.00 per carload for the second 25 miles or fractional part thereof, and not exceeding $2.00 per carload for each additional 25 miles, or fractional part thereof. In computing the rate of freight according to the provisions of this article, the distance shall be computed from the point where it is received, to the point of destination in the state, notwithstanding it may pass from one road to another.

SECTION 1194*a*. That for the violation of the foregoing sections the railroad company so offending shall forfeit and pay to any person thereby affected the freight rate charged, demanded, or received in excess of the rates prescribed in said section, together with all actual damages caused thereby, to be recovered in any court having jurisdiction thereof by the existing law. And if tthe plaintiff in such action recover judgment therein, the court shall
10 treble the same and the plaintiff shall, on motion, be allowed a reasonable attorney's fee for bringing the action.

SECTION 1194*b*. All acts and parts of acts, and all rules and regulations, freight schedules, classifications and groupings by railroad companies or the railroad and warehouse commissioners of this state in conflict with the provisions of this act are hereby repealed and declared void.

Said act will, under the Constitution of the State of Missouri, take effect on the 16th day of June, 1905, which will be ninety days after the adjournment of the session of the legislature at which the act was passed. The rates now being carefully charged by your orator for the transportation of freight of the character mentioned in the said act, are shown in schedules now on file with the railroad commissioners and posted in your orator's depots and railroad stations, and are far in excess of the maximum rates fixed in said Act of 1905, so that when said act becomes effective, if permitted to be enforced, it will require such a reduction in your orator's said rates as to make imperative a change in the said schedules, which change, your orator does not propose to make, and cannot make without jeopardizing its property interests. The railroad commissioners propose and threaten to, and will, unless enjoined herein, enforce the special provisions of the statute of the state for the enforcement of said Act of 1905 by entering upon investigations, both upon its own instigation and upon the complaint of shippers, and by determining and adjudging your orator's present schedule of rates posted and filed as aforesaid to be unreasonable, unjust and extortionate, for the sole reason that said rates are higher than those prescribed by the said Act of 1905, and by requiring, under the pain of large penalties, threatened to be enforced, your orator to file and publish a new schedule, fixing rates not in excess of those mentioned in said Act of 1905. Besides which, said railroad commissioners propose,
as specially required by law, to file, post and publish as your
11 orator's said schedule, the maximum rates fixed in said act, if and when your orator refuses so to do, and they propose to

direct each of the prosecuting attorneys in each of the counties through which the line of your orator runs, to prosecute and recover of your orator the large and excessive penalties provided by law, and to direct the defendant, the attorney general, to assist in such prosecutions, and to direct the defendant attorney general to prosecute your orator and recover the penalties provided by law for its failure to comply with the orders which the railroad commissioners propose from time to time to make in investigations instituted for the enforcement of the said Act of 1905, by compelling your orator to adopt a rate in accordance therewith. Said prosecuting attorneys and attorney general will, unless restrained herein, conduct said prosecutions and seek to recover said penalties.

The shippers along the line of your orator's railroad are very numerous, and are daily engaged in making and receiving shipments to and from points in Missouri of freight of the special classes designated in the Act of 1905, so that, unless restrained by this court, there will be instituted by them a multiplicity of suits to recover of your orator treble damages sustained, together with attorneys' fees in each case. Said parties being so numerous, and the causes of action which will accrue so many, if the Act of 1905 be enforced, that it is not practicable to make more than part of said shippers defendants hereto, but all other shippers in the counties in the state where your orator's lines of road extend, are likewise interested with those named as defendants herein, so that such as are named as such defendants should defend for all those having like interest, any such omitted party being permitted to become a defendant herein if so desired, to the end that all persons having a like interest will be bound by the decree to be entered herein, and the court have an opportunity to determine once for all the validity of said Act of 1905.

12 VIII.

Said Act of 1905 is invalid and inoperative, and of no force or effect, for each of the following reasons:

(*e*) It attempts to adopt and create as part of Article 4 of Chapter 12 of the Revised Statutes of Missouri, 1899, two sections called Sections 1194*a* and 1194*b*, when the Act of 1903 adopted sections so numbered as part of the same article and chapter. There was, by the Act of 1905, no repeal, or attempted repeal, of said Act of 1903. The Act of 1905 cannot be treated as amendatory to the Act of 1903, because it is insufficient, since it does not in anywise comply with the provisions of Section 34, Article 4 of the Constitution of the State of Missouri. Said provision being as follows:

SECTION 34. No act shall be amended by providing that designated words thereof be stricken out, or that designated words be inserted, or that designated words be stricken out and others inserted in lieu thereof; but the words to be stricken out, or the words to be inserted, or the words to be stricken out, and those inserted in lieu thereof, together with the act or section amended, shall be set forth in full as amended.

The act, is, therefore, invalid, because the law, as it now stands, is uncertain, there being two separate enactments upon two different subjects, designated as Sections 1194*a* and 1194*b* of Article 4 of Chapter 12 of the Revised Statutes of 1899.

(*d*) It provides in Section 1194 that no individual, company or corporation, owning, operating, managing or leasing, any railroad, or part of railroad, designated in Section 1191 as in classes A, B or C, shall demand, charge or receive, a greater or higher rate for carrying from initial to terminal points in this state articles named in the several classes therein designated than as therein provided for, but it also provides in Section 1194*a* that the penalty for a violation of the act shall be enforced only against railroad companies, thereby exempting individuals from such penalties. This is a dis-
13 crimination between individuals and companies, and denies to your orator the equal protection of the laws guaranteed it by the Fourteenth Amendment to the Constitution of the United States.

(*a*) It fixes rates confiscatory in their nature, unreasonable in amount, insufficient to permit your orator to operate its property in Missouri without loss, making it impossible for freight to be carried by your orator between points in Missouri at any profit, all of which is contrary to and violative of the provisions of the Constitution of the United States, and particularly of the Fourteenth Amendment thereto, prohibiting the taking of property without due process of law, and guaranteeing to all persons equal protection of the laws.

(*b*) It is invalid as alleged in paragraphs XII and XIII hereof, whereby it is violative of said Amendment to the Constitution of the United States.

(*c*) It provides that in computing the rate of freight, the distance shall be computed from the point where it is received to the point of destination in the state, notwithstanding it may pass from one road to another. This impairs your orator's freedom of contract, fixes a rate for it based upon carriage over the line of another road, whereby the provisions of the Federal Constitution and the Amendments thereto hereinbefore referred to, are violated, and the freedom of contract guaranteed by Section 4, Article 2 of the State Constitution, denied.

IX.

Your orator has in its entire system 915 miles of railroad, and in acquiring and constructing said system, it has expended large sums of money for right of way, ties, iron, grading, bridging,
14 equipment, and for all the facilities and appliances necessary for the operation of a railway, and it has, at great cost, acquired terminals and terminal facilities at various cities and towns to and through which its system extends. All of said railway, including that portion in Missouri, was constructed and fairly acquired at a fair and reasonable cost; it was judiciously located, and has at all times been properly and economically operated. Its capitalization in bonds and stocks aggregate, 122,503 dollars per mile for its entire system, which capitalization is fair and reasonable and less

than the amount for which said road could be reproduced. Its fixed charges are no more than would be required to produce and acquire the property, its equipment, facilities and terminals. All the lines in Missouri secure and receive a due, fair and reasonable proportional benefit of the entire system, and the value of the property in Missouri, as well as its capacity for serving the public, is proportionately increased and augmented thereby. The cost of constructing and replacing said railroad in Missouri and providing and furnishing its equipment and terminals, as well as constructing and replacing its entire system to-day would largely exceed the original cost. Upon the value of the property of your orator, it has only been able in the past to have any kind of returns, because it was operated as part of a whole system. The said rates fixed in said Act of 1905 are unjust, unfair and unreasonable.

X.

The rates now charged by your orator for state shipments of the classes of freight mentioned in the Act of 1905 are in excess of the maxima therein fixed. If, for the classes of freight mentioned in the Act of 1905, charges should be by your orator made at the maximum rates therein fixed for state shipments, your orator would be required to do such business, not only without profit, but at a loss, and without any return upon its investment in this state. Such rates in said Act of 1905 mentioned are unjust, unreasonably low, confiscatory in their nature and will not make any return upon the investment in the property of your orator in this state. Taking the gross receipts of all the state business of whatsoever kind which your orator does, can or will do in Missouri when charging the maximum rates fixed by the Act of 1905 for the classes of freight therein mentioned, and deducting from the total receipts the cost of doing such business in the state, there will not be sufficient to pay operating expenses, and there will not be left any sum as profit or as a return upon the value of the property of your orator devoted to the use of such business in the state.

The maximum rates for each class of freight mentioned in the Act of 1905 are not sufficient to pay the cost of carriage thereof.

XI.

The total earnings of your orator from local and state freight business in Missouri for the last three years were not in excess of: For the fiscal year ending in 1902, $238,746; 1903, $238,454; 1904, $296,499.

The expenses of doing such local and state business for said three years was in excess of these figures:—for the fiscal year ending in 1902, $185,680; 1903, $195,245; 1904, $255,068.

The reduction in rates under said Act of 1905 will not increase the local traffic, and the volume of state and local business will not be more in 1905 than it was in 1904, while the expense of doing such

business will be as great, and if in the future said business
16 increases there will be a proportional increase in said expenses.
The value of the part of your orator's property in Missouri used in doing such state and local business is not less — $4,327,703.

If, for the class of freight mentioned in the Act of 1905, your orator should charge the maximum rates therein fixed, its total gross receipts from local or state traffic in Missouri will be so reduced as not to exceed $114,509.10 per annum, and the expenses aforesaid will not be lessened, which makes the attempted reduction in both gross and net receipts unfair and unjust and fails to give a fair return upon the investment in your orator's said property, and the enforcement of said act will compel your orator to do its local and state business in such a way as not to permit it to make a fair and reasonable profit thereon.

XII.

There are in this state carrying therein the classes of freight mentioned in said act, and hence affected thereby, the following companies owning lines of railroad:

The Chicago & Alton Railway Company, the Wabash Railroad Company, the St. Louis & San Francisco Railroad Company, the Missouri Pacific Railway Company, The St. Louis, Iron Mountain & Southern Railway Company, The Kansas City Southern Railway Company, The Chicago, Rock Island & Pacific Railway Company, The Chicago, Burlington & Quincy Railroad Company, The St. Joseph & Grand Island Railway Company, The Chicago Great Western Railway Company, The Chicago, Milwaukee & St. Paul
Railway Company, The Atchison, Topeka & Santa Fe Rail-
17 way Company, The St. Louis & Hannibal Railway Company and The Missouri, Kansas & Texas Railway Company.

Each and all of said companies claim that the maximum rates fixed by said Act of 1905 are confiscatory in their nature, and if charged, would result in said company doing its state business without any profit, which, as a fact, is true. Each of said companies has filed, or will at once, file a bill similar to that now prescribed by your orator. Even if in this cause it should be held that such maximum rates should be valid as against your orator, yet as a matter of fact, same are unreasonably low as against each of said other companies and will not permit either of said companies to make a profit upon its state business, and therefore said act is invalid as against said company. This being true, the act, even if held valid as to your orator, is unconstitutional, because it would thereby become discriminatory, in that it would not apply alike to all persons or corporations operating railroads in this state, whereby the provisions of the Constitution of the United States, and the Amendments thereto hereinbefore mentioned are violated.

XIII.

Said Act of 1905 fixes and establishes maximum rates which are unjust, unreasonable and unconstitutional in this: The cost of transporting live stock is greater than that of any of the other commodities in which a reduction is made, yet said act reduces the rate

thereon on an average of 27 per cent, which reduction in rates on salt and cement is only 16¼ per cent and in the case of lumber, lath- and shingles of 15 per cent. The different articles transported on your orator's railway have been arranged in classes according to cost of carriage, price, risk of injury, bulk, volume of traffic,
18 and other circumstances well understood, and have remained in substantially the same classes for many years, which has been recognized, approved and enacted into law by a statutory classification in effect in Missouri, since 1893, and as required by its Railroad Commissioners. The unequal, partial, arbitrary reduction in rates upon articles affected by said Act of 1905, as compared with other commodities and between different commodities themselves included in said act, not only works an injustice between the shippers, purchasers, manufacturers of the State of Missouri, and deprives them of their property without due process of law and deprives them of the equal protection of the laws, but likewise operates to deprive your orator of its property without due process of law, and deprives it of the equal protection of the laws in that the legislature, having established maximum rates of charges for the transportation of all kinds of property, which are presumably fair and reasonable, now attempts to further regulate the affairs of your orator and to require it to discriminate in favor of certain persons and shippers and to give them a right of transportation for a less rate than the general rate heretofore fixed by law than is just and reasonable, in view of the cost to the carrier or the value of the service rendered to the shipper.

In consideration whereof, and forasmuch as your orator is remediless in the premises, and by the strict rules of the common law can only have relief in a court of equity where matters of this kind are properly cognizable and relievable, your orator prays: First, That the said act of the legislature of Missouri set forth in paragraph VII of this bill, and for convenience called the Act of 1905, be declared unconstitutional, unenforcible and not binding upon your orator. Second, That the defendants, John A. Knott, Joseph P. Rice and Frank A. Wightman as Railroad Commissioners of the State of Missouri, their successors in office, agents and servants, be temporarily and permanently enjoined and restrained from taking any step to
19 put in force the maximum rates mentioned in said Act of 1905, from requiring your orator to post same at any place or to file same with them; from receiving a schedule thereof to be filed with them; from taking or making out, or printing, or delivering any schedule of rates for your orator containing the maximum rates fixed by said act; from instituting or permitting any investigation of any complaint that any rate is unreasonable, extortionate or unjust because higher than the maximum rate fixed by said Act of 1905; from directing the Attorney General of the state or any prosecuting attorney or other attorney therein to prosecute or assist in prosecuting your orator, directly or indirectly, for any failure, to file the schedule adopting the said maximum rates, or for any failure to recognize, adopt or comply with said Act of 1905. Third, That defendant, Herbert S. Hadley, the Attorney General, be temporarily and perma-

nently enjoined and restrained from prosecuting or assisting in the prosecution of any suit or action against your orator to enforce against it in any action, directly or indirectly, any penalty in any wise dependent or based upon the failure of your orator to recognize and abide by the said Act of 1905. Fourth, That the defendants, William T. Kemper and Alexander McKenzie, and all other shippers affected by this proceeding, be temporarily and permanently enjoined and restrained from instituting any action under or taking any steps to collect any penalties or damages for the alleged violation of said Act of 1905. Fifth, That your orator have such other and further relief as may be just and equitable.

And may it please your Honors to grant unto your orator a writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the said John A. Knott, Joseph P. Rice and Frank A. Wightman, Railroad Commissioners of Missouri; Herbert S. Hadley, Attorney General of the State of Missouri; William T. Kemper and Alexander McKenzie, commanding them and each of them on a day certain therein to be named and under a certain penalty, to be and appear before this honor-
20 able court, then and there to answer, but not under oath, (such oath being expressly waived), all and singular the premises, and to stand to, perform and abide by such order, direction and decree as may be made against them in the premises.

And your orator will ever pray, etc.

____ ____,

By FRANK HAGERMAN,
Solicitor for Complainant.

EDWARD L. SCARRITT,
Of Counsel.

STATE OF MISSOURI,
County of Jackson, ss:

I, W. M. Corbett, upon oath say, I am a superintendent of The Chicago & Alton Railway Company, complainant in above entitled bill, and as such officer have charge of the traffic operations of said company, in Missouri, and of the matters and things mentioned in said bills which I have read. I know the contents thereof, and the same are true of my own knowledge, except as to those matters therein stated upon information and belief, and as to those matters, I believe them to be true.

W. M. CORBETT.

Subscribed and sworn to before me this 19th day of June, 1905.
My commission expires Aug. 13, 1905.

[SEAL.]

BERTHA L. JOHNSON,
Notary Public.

Thereupon, to-wit, on the 23d day of June, 1905, the following restraining order was filed and entered of record:

21 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3006.

THE CHICAGO & ALTON RAILWAY COMPANY, Complainant,
vs.
JOHN A. KNOTT, JOSEPH P. RICE and FRANK A. WIGHTMAN, Railroad Commissioners of the State of Missouri; Herbert S. Hadley, Attorney General of the State of Missouri; William T. Kemper, and Alexander McKenzie, Defendants.

Restraining Order.

The original bill of complaint having been this June 23, 1905, by the solicitors for complainant duly presented, and the court being fully advised in the premises, orders and decrees: Complainant's application for temporary injunction herein is set down for hearing at the United States Circuit Court room in Kansas City, Missouri, on June 26, 1905, at 10 o'clock a. m., or as soon thereafter as it is convenient for the court to hear the same.

In the meantime, and until the further order of court herein, each and all of the above named defendant railroad commissioners, their agents, servants and successors, are restrained from taking any steps to put in force the maximum rates mentioned in the act of the legislature of the State of Missouri, approved April 15, 1905, and entitled "An Act, entitled 'An Act to amend chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled "Corporations, private," by repealing section 1194 of said Revised Statutes, being part of article IV of said chapter concerning railroad classification—charges—commissioners, and to enact in lieu thereof the following new sections providing for the regulation of freight charges by railroads and the recovery of penalties for the violation thereof;' " from requiring complainant to post said maximum rates at any place, or to file same with them; from requiring a schedule thereof to be filed with them; from taking or making out, or printing, or delivering any schedule of rates for complainant containing the maximum rates fixed by said act; from instituting any investigation of any complaint that any rate is unreasonable, extortionate or unjust because higher than the maximum rate fixed by said act; from directing the attorney general of the state, or any prosecuting attorney therein to prosecute or assist in prosecuting complainant directly or indirectly for any failure to
22 file a schedule adopting said maximum rates; or for any failure to recognize, adopt or comply with said act.

And in the meantime, and until the further order of the court herein, the above named attorney general and his assistants and successors are restrained from bringing any suit or action against complainant to enforce against it, directly or indirectly, any penalty in anywise dependent or based upon the failure of complainant to recognize or abide by the said act of the legislature.

And in the meantime and until the further order of court herein, the defendants John A. Knott, Joseph P. Rice and Frank A. Wightman, Railroad Commissioners of the State of Missouri; Herbert S. Hadley, Attorney General of the State of Missouri; William T. Kemper and Alexander McKenzie, and all other shippers affected by this proceeding, are restrained from instituting any action, or taking any steps to collect any penalties for the alleged violation of said act of 1905.

(Signed) JNO. F. PHILIPS, *Judge*.

Received copy of foregoing restraining order this — day of June, 1905, and the undersigned defendants enter their appearances in said case as of the August, 1905, rules.

—— ——.

23 Afterwards, to-wit, on the 27th day of June, 1905, the following Order continuing Restraining Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2988.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri; and Joseph P. Rice, John A. Knott and Frank A. Wightman, Railroad Commissioners of the State of Missouri, et al., Defendants.

No. 2989.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2990.

THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2991.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2992.

THE ST. LOUIS, KANSAS CITY AND COLORADO RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2993.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

24 No. 2994.

THE ST. LOUIS & HANNIBAL RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2995.

THE MISSOURI PACIFIC RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2996.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2997.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2998.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2999.

QUINCY, OMAHA AND KANSAS CITY RAILROAD COMPANY, Complainant,
vs.
SAME, Defendants.

No. 3000.

THE WABASH RAILROAD COMPANY, Complainant,
vs.
SAME, Defendants.

No. 3001.

THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

25 No. 2994.

THE ST. LOUIS & HANNIBAL RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2995.

THE MISSOURI PACIFIC RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2996.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2997.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2998.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2999.

QUINCY, OMAHA AND KANSAS CITY RAILROAD COMPANY, Complainant,
vs.
SAME, Defendants.

No. 3000.

THE WABASH RAILROAD COMPANY, Complainant,
vs.
SAME, Defendants.

No. 3001.

THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

26 No. 3002.

KANSAS CITY, CLINTON & SPRINGFIELD RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 3003.

CHICAGO GREAT WESTERN RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 3004..

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 3006.

THE CHICAGO & ALTON RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

Order.

The application of complainants in above cases for temporary injunction coming on for hearing, this June 27th, 1905, complainants appearing by Frank Hagerman, their solicitor, and the Attorney General in person. At the request of the latter it is ordered that the said application be continued till July 8, 1905, and until further order of court the restraining orders heretofore issued shall continue in force.

(Signed) JNO. F. PHILIPS,
(Signed) SMITH McPHERSON,
Judges.

27 Thereupon a duly certified copy of the restraining order was issued, and the same was duly returned and filed on the 8th day of July, 1905, with the following endorsement:

Received copy of foregoing restraining order this 24th day of June, 1905, and the undersigned defendants enter their appearance in said case as of the August 1905, Rules.

ALEXANDER McKENZIE.
WM. T. KEMPER.

28 Afterwards, to-wit, on the 12th day of July, 1905, the following order continuing restraining order was filed and entered of record, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. —.

—— ——, Complainant,

vs.

HERBERT S. HADLEY, Attorney General; JOSEPH P. RICE, JOHN A. Knott and Frank A. Wightman, Railroad Commissioners, et al., Defendants.

Order.

This cause came on for hearing this 12th day of July, 1905, upon complainant's application for temporary injunction. The complainant, the attorney general and the defendant railroad commissioners appeared by counsel; the other defendants having been notified of the hearing; and the court being fully advised in the premises, orders and adjudges:

1. The restraining order heretofore issued herein shall continue and remain in force as a temporary injunction.

2. The complainant shall, on or before the 25th day of July, 1905, file herein an injunction bond in the sum of Ten Thousand dollars, to be approved by a judge or a clerk of this court, the defendants consenting to accept the individual bond of the complainant, conditioned to pay, in case said injunction be dissolved, all damages ascertained herein to have been sustained by the defendants or any of them, or any person becoming a defendant herein.

(Signed) JNO. F. PHILIPS, *Judge.*

29 Afterwards, to-wit, on the 22nd day of July, 1905, the Injunction Bond was approved and filed. Said Injunction Bond is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3006.

THE CHICAGO & ALTON RAILWAY COMPANY, Complainant,

vs.

HERBERT S. HADLEY, Attorney General; JOSEPH P. RICE, JOHN A. Knott, and Frank A. Wightman, Railroad Commissioners, et al., Defendants.

Injunction Bond.

Know all men by these Presents, That the above complainant is held and firmly bound to above named defendants in the penal sum of Ten thousand dollars ($10,000) well and truly to be paid in lawful money of the United States, for the payment of which it binds itself, its executors, administrators, successors and assigns.

This bond is made upon these conditions:

Whereas, the Court in above entitled cause made an order on July 12, 1905, granting a temporary injunction,

Now if said obligor pays, in case said injunction be dissolved, all damages ascertained herein to have been sustained by the defendants or any of them, or any person becoming a defendant herein, then this obligation to be void; otherwise in force and effect.

Witness the hand and seal of said party this July 14th 1905.

THE CHICAGO AND ALTON RAILWAY COMPANY.

[SEAL.] B. M. FELTON, *President.*

Attest:

CHAS. DENI,
Ass't Secretary.

30 The foregoing bond is approved this 22 day of July, 1905, the appearing defendants waiving the necessity of any surety signing the bond.

ADELAIDE UTTER, *Clerk.*

31 Afterwards, to-wit, on the 7th day of August, 1905, the demurrer of Herbert S. Hadley, Attorney General, was filed. Said demurrer is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3006.

THE CHICAGO AND ALTON RAILWAY COMPANY, Complainant,

vs.

JOHN A. KNOTT, JOSEPH P. RICE and FRANK A. WIGHTMAN, Railroad Commissioners of the State of Missouri; Herbert S. Hadley, Attorney General of the State of Missouri; William T. Kemper and Alexander McKenzie, Defendants.

The Demurrer of Herbert S. Hadley, Attorney General of the State of Missouri, One of the Above-named Defendants, to the Bill of Complaint of The Chicago and Alton Railway Company, the Above-named Complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained, to be true, in such manner and form as the same are therein and thereby set forth and alleged, demurs to the said bill, and for cause of demurrer shows:

1. That it appears by the complainant's own showing by the said bill, that it is not entitled to the relief prayed by said bill, or any relief whatever, against this defendant.

2. The said bill of complaint of the complainant is wholly without equity.

3. That it does not appear from said bill of complaint that charges for the transportation, between points within this State, of
32 such articles of freight, maximum rates for the transportation of which are not fixed by said Act of 1905, might not or could not have been established by the complainant, if it had chosen to make any effort to do so, or by said Board of Railroad Commissioners, if it had been permitted by the complainant to do so, at such rates as would have been reasonable and just, both to the complainant and to the public, observance of which and of the provisions of the Act of 1905, in the transportation by complainant of its intra-state traffic, would, as a whole, have rendered to the complainant a fair and reasonable profit for the service of transporting the same. The complainant has made no effort or attempt to readjust its schedules of freight rates, as a whole, with a view of complying with the requirements of said Act of 1905, nor has it afforded to the said Board of Railroad Commissioners any opportunity on its part, of making such effort, but, on the contrary, by filing the bill of complaint herein on the day said act of 1905 took effect, and obtaining the restraining order herein, before said Board of Railroad Commissioners could, by any possibility, have taken any action in the direction of establishing freight rate schedules for intra-state traffic, which, considered as a whole, would produce a reasonable compensation to the complainant for its service, has prevented said Board from making any such effort.

4. That this defendant is not a proper party defendant to the bill of complaint.

Wherefore, and for divers other good causes of demurrer appearing on said bill, this defendant demurs thereto, and he prays the judgment of this Honorable Court whether he shall be compelled to make further answer, or any answer, to the said bill; and he humbly prays to be hence dismissed with his reasonable costs in his behalf sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
SANFORD B. LADD,
Solicitors for Defendant.

32½ SANFORD B. LADD,
Of Counsel.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

SANFORD B. LADD,
Of Counsel for Defendant.

Afterwards, to-wit, on the 7th day of August, 1905, the Joint Demurrer of John A. Knott, Joseph P. Rice and Frank A. Wightman was filed. Said demurrer is in words and figures as follows, to-wit:

33 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3006.

THE CHICAGO AND ALTON RAILWAY COMPANY, Complainant,
vs.
JOHN A. KNOTT, JOSEPH P. RICE, and FRANK A. WIGHTMAN, Railroad Commissioners of the State of Missouri; Herbert S. Hadley, Attorney General of the State of Missouri; William T. Kemper, and Alexander McKenzie, Defendants.

The Joint Demurrer of John A. Knott, Joseph P. Rice, and Frank A. Wightman, Railroad Commissioners of the State of Missouri, Three of the Above-named Defendants, to the Bill of Complaint of The Chicago and Alton Railway Company, the Above-named Complainant.

These defendants, respectively, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained, to be true, in such manner and form as the same are therein and thereby set forth and alleged, demur to the said bill, and for causes of demurrer show:

1. That it appears by the complainant's own showing by the said bill, that it is not entitled to the relief prayed by said bill against these defendants, or either of them.

34 2. That said bill of complaint of the complainant is wholly without equity.

2. That it does not appear from said bill of complaint that charges for the transportation, between points within this State, of such articles of freight, maximum rates for the transportation of which are not fixed by said Act of 1905, might not or could not have been established by the complainant, if it had chosen to make any effort to do so, or by said Board of Railroad Commissioners, if it had been permitted by the complainant to do so, at such rates as would have been reasonable and just, both to the complainant and to the public, observance of which and of the provisions of said Act of 1905, in the transportation by complainant of its entire intra-state traffic, would, as a whole, have rendered to the complainant a fair and reasonable profit for the service of transporting the same. The complainant has made no effort or attempt to readjust its schedules of freight rates, as a whole, with a view of complying with the requirements of said Act of 1905, nor has it afforded to the said Board of Railroad Commissioners any opportunity, on its part, of making such effort, but, on the contrary, by filing the bill of complaint herein on the day said Act of 1905 took effect, and obtaining the restraining order herein, before said Board of Railroad Commissioners could, by any possibility, have taken any action in the direction of establishing freight rate schedules for intra-state traffic, which, considered as a whole, would produce a reasonable com-

pensation to the complainant for its service, has prevented said Board from making any such effort.

34½ Wherefore, and for divers other good causes of demurrer appearing on said bill, these defendants demur thereto, and they pray the judgment of this honorable Court whether they shall be compelled to make further or any answer to the said bill; and they humbly pray to be hence dismissed with their reasonable costs in their behalf sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
SANFORD B. LADD,
Solicitors for Defendants.

SANFORD B. LADD,
Of Counsel.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

SANFORD B. LADD,
Of Counsel for Defendants.

Afterwards, to-wit, on the 7th day of August, 1905, the Demurrer of Alexander McKenzie was filed. Said demurrer is in words and figures as follows, to-wit:

35 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3006.

THE CHICAGO AND ALTON RAILWAY COMPANY, Complainant,
vs.
JOHN A. KNOTT, JOSEPH P. RICE, and FRANK A. WIGHTMAN, Railroad Commissioners of the State of Missouri; Herbert S. Hadley, Attorney General of the State of Missouri; William T. Kemper, and Alexander McKenzie, Defendants.

The Demurrer of Alexander McKenzie, One of the Above-named Defendants, to the Bill of Complaint of The Chicago and Alton Railway Company, the Above-named Complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained, to be true, in such manner and form as the same are therein and thereby set forth and alleged, demurs to the said bill, and for causes of demurrer, shows:

1. That it appears by the complainant's own showing by the said bill, that it is not entitled to the relief prayed by said bill, or any relief whatever, against this defendant.

2. That said bill of complaint of the complainant is wholly without equity.

36 3. That this defendant is not a proper party defendant to the bill of complaint.

Wherefore, and for divers other good causes of demurrer appearing on said bill, this defendant demurs thereto, and he prays the judgment of this honorable Court whether he shall be compelled to make further or any answer to the said bill; and he humbly prays to be hence dismissed with his reasonable costs in his behalf sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
SANFORD B. LADD,
Solicitors for Defendants.

SANFORD B. LADD,
Of Counsel.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

SANFORD B. LADD,
Of Counsel for Defendants.

Afterwards, to-wit, on the 7th day of August, 1905, the demurrer of William T. Kemper was filed. Said demurrer is in words and figures as follows, to-wit:

37 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3006.

THE CHICAGO AND ALTON RAILWAY COMPANY, Complainant,
vs.
JOHN A. KNOTT, JOSEPH P. RICE, and FRANK A. WIGHTMAN, Railroad Commissioners of the State of Missouri; Herbert S. Hadley, Attorney General of the State of Missouri; William T. Kemper, and Alexander McKenzie, Defendants.

The Demurrer of William T. Kemper, One of the Above-named Defendants, to the Bill of Complaint of the Chicago and Alton Railway Company, the Above-named Complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained, to be true, in such manner and form as the same are therein and thereby set forth and alleged, demurs to the said bill, and for causes of demurrer, shows:

1. That it appears by the complainant's own showing by the said bill, that it is not entitled to the relief prayed by said bill, or any relief whatever, against this defendant.

2. That said bill of complaint of the complainant is wholly without equity.

38 3. That this defendant is not a proper party defendant to the bill of complaint.

Wherefore, and for divers other good causes of demurrer appearing on said bill, this defendant demurs thereto, and he prays the judgment of this honorable Court whether he shall be compelled to make further or any answer to the said bill; and he humbly prays to be hence dismissed with his reasonable costs in his behalf sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
SANFORD B. LADD,
Solicitors for Defendants.

SANFORD B. LADD,
Of Counsel.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

SANFORD B. LADD,
Of Counsel for Defendants.

39 Afterwards, to-wit, on the 14th day of October, 1905, a waiver of affidavits to demurrers was filed. Said waiver of affidavits is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. —.

THE CHICAGO & ALTON RAILWAY COMPANY, Complainant,
vs.
JOHN A. KNOTT et al., Defendants.

The affidavits of the defendants to the several demurrers this day filed herein to the Bill of Complaint, are hereby waived.

Kansas City, Mo., August 7, 1905.

FRANK HAGERMAN,
Solicitor for Complainant.

40 Afterwards, to-wit, on the 14th day of October, 1905, the following order was filed and entered of record, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3006.

THE CHICAGO & ALTON RAILWAY CO., Complainant,
vs.
JOHN A. KNOTT et al., Defendants.

Order.

This cause coming on for hearing this October 14, 1905, upon each and all of the demurrers heretofore filed by defendants herein, the complainant appeared by Frank Hagerman, its solicitor, and the court being fully advised in the premises overrules each and all of the said demurrers, and at the request of the said solicitor of said defendants they are given until the November, 1905, Rules in which to file answers.

(Signed) SMITH McPHERSON, *Judge.*

Afterwards, to-wit, on the 28th day of November, 1905, the Joint Answer of John A. Knott, Joseph P. Rice and Frank A. Wightman was filed. Said Joint Answer is in words and figures as follows, to-wit:

41 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3006.

THE CHICAGO AND ALTON RAILWAY COMPANY, Complainant.
vs.
JOHN A. KNOTT, JOSEPH P. RICE AND FRANK A. WIGHTMAN, Railroad Commissioners of the State of Missouri; Herbert S. Hadley, Attorney General of the State of Missouri; William T. Kemper, and Alexander McKenzie, Defendants.

The Joint and Several Answer of John A. Knott, Joseph P. Rice and Frank A. Wightman, Three of the Defendants, to the Bill of Complaint of the Chicago and Alton Railway Company, Complainant.

These defendants respectively now and at all times hereafter saving to themselves all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering, say:

I.

They admit the averments of the paragraph numbered I of the complainant's bill of complaint, except in the following particular:

They say that they have no knowledge, information or belief
42 as to whether the mileage of the railroads owned and operated by it in Missouri, amounts in the aggregate to two hundred and sixty-three and one-half (263½) miles.

II.

These defendants admit that this cause arises under the Constitution and Laws of the United States; but they deny that said Act of 1905 is unconstitutional or violative of the provisions of the Constitution of the United States or of the Fourteenth Amendment thereto, or contrary to the laws of the United States. They admit that the matter and amount in dispute exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars ($2,000.)

III.

They admit that they constitute the Board of Railroad Commissioners of the State of Missouri, and that the defendant, Herbert S. Hadley, is the Attorney General of the State of Missouri, but they deny that either they or the said defendant, Hadley, are required by law to do or perform the special duties mentioned in said bill of complaint, except as in this answer hereinafter admitted.

IV.

They admit that the other defendants are citizens and residents, respectively, of the State of Missouri, and of the counties of said State mentioned in paragraph IV of said bill of complaint; but whether each or any of them are engaged in shipping over the complainant's road or other roads in the State of Missouri, any of the commodities mentioned in the Act of 1905, or whether they represent any class of shippers, these defendants have no knowl-
43 edge, information or belief.

V.

They admit that paragraph V of the complainant's bill of complaint correctly sets out Sections 1191, 1192 and 1193 of the Revised Statutes of Missouri, of 1899, and that Section 1194 of said Revised Statutes fixed the maximum rates for the classes of freight designated in said Section 1193, as Classes D, E, F, G, H, I and J, respectively. They admit that the statutes of the State provide for the election and qualification of Railroad Commissioners, and prescribe their special duties, and as to the allegations in paragraph V of said bill of complaint, regarding the special duties imposed upon them and upon prosecuting attorneys and the Attorney General, by the statutes of the State, they aver that Articles II and IV of Chapter 12 of the Revised Statutes of Missouri, of 1899, and an Act of the

General Assembly of the State of Missouri, entitled "An Act to amend Chapter 12 of the Revised Statutes of the State of Missouri, of 1899, entitled 'Corporation, private', by adding two new sections after Section 1194, to be known as sections 1194*a* and 1194*b*, providing that the board of railroad and warehouse commissioners shall fix, maintain, establish, reduce and modify freight rates upon all railroads in this State, and providing for the manner of so doing and enforcing the same," approved April 6, 1903, published in the "Laws of Missouri," passed at the session of the Forty-second General Assembly, at page 132, of which said statutes and Act this court will take judicial notice, prescribe particularly all the duties imposed by law upon these defendants, constituting the Board of Railroad Commissioners, and upon prosecuting attorneys and the Attorney General, respecting freight rates and the enforce-
44 ment of any laws of this State governing or affecting the same; and they pray leave to refer to said statutes and said Act, and that the same may be considered in connection with this answer with like effect as if they had been fully set out herein.

VI.

These defendants admit the passage by the legislature of the State of Missouri, of the Act approved April 6, 1903, and that said Act is correctly set out in paragraph VI of said bill of complaint.

VII.

These defendants admit the passage by the legislature of the State of Missouri, of the Act approved April 15, 1905, and that said Act is correctly set out in paragraph VII of said bill of complaint. They admit that said last named Act took effect on the 16th day of June, 1905; that the rates at the time of the filing of said bill of complaint being charged by the complainant for the transportation of freight of the character mentioned in said last named Act, were shown in schedules on file with the Railroad Commissioners; but these defendants deny that said rates so charged by complainant were, as respects all the freight of the character mentioned in said Act, in excess of the maximum rates fixed by said Act of 1905. They admit that as to some of the commodities mentioned in said Act, the same would require some reduction in the rates charged by the complainant for the transportation thereof at the time of the filing of said bill of complaint, and that such reduction would make necessary a change in the schedules so filed by the complainant with the Railroad Commissioners; but these defendants deny
45 that such change could not and cannot be made by the complainant without jeopardizing its property interests. These defendants deny that they had at or before the filing of said bill of complaint threatened to enforce the provisions of said Act of 1905 by entering upon investigations, either upon the instigation of the Board of Railroad Commissioners or on the complaint of shippers or by determining or adjudging complainant's then existing schedule of rates to be unreasonable, unjust or extortionate, or by

requiring the complainant, under pain of any penalties, to file or publish a new schedule fixing rates not in excess of those mentioned in said Act of 1905; and they deny that they proposed to do any of said things. They deny that they proposed to file, post or publish, as the complainant's schedule, the maximum rates fixed in said Act of 1905, if the complainant should refuse to do so, or to direct any prosecuting attorney to prosecute or recover of complainant any penalties, or to direct the Attorney General to assist in any such prosecution, or to recover any penalties for the complainant's failure to comply with the orders which they proposed from time to time to make in investigations instituted for the enforcement of said Act of 1905. They deny that at that time they proposed to make any such investigations. On the contrary, these defendants aver that when this suit was begun the time had not arrived at which these defendants could take any action whatever under or in pursuance of said Act of 1905, and that they were not at that time proposing, because the time had not then arrived, when they, as such Board of Railroad Commissioners, could properly or lawfully propose any action in the premises. They had not, as a Board, determined or considered the course proper to be pursued by them in respect of the matter when said Act of 1905, should have taken effect.

46 They deny that any prosecuting attorney or the Attorney General would have conducted such prosecutions or sought to recover any such penalties.

As to whether shippers along the line of the complainant's railroad were then and are now numerous, or engaged daily or at all in making or receiving shipments to or from points in the State of Missouri, of any freight of the special classes designated in said Act of 1905, these defendants have no knowledge, information or belief. They deny that any such shippers or shipper would have or will institute suits to recover of the complainant any damages or attorneys' fees for charging rates higher than those fixed by said Act of 1905.

Whether any other shippers in the counties in the State where the complainant's line of road extends, are interested with those named as defendants herein, these defendants have no knowledge, information or belief; but they deny that any shipper or other person not named as a defendant in this action can or will be bound by any decree which may be entered herein.

VIII.

These defendants deny that said Act of 1905 is invalid or inoperative or of no force or effect for any of the reasons mentioned in paragraph VIII of the complainant's said bill of complaint. They deny that said law as it now stands is uncertain, as averred in subdivision (*e*) of paragraph VIII of the complainant's bill of complaint, for the reason stated therein, or for any other reason, or that said Act of 1905 is invalid because of any reason stated in said subdivision (*e*). They deny that said Section 1194*a* is a discrimination between individuals and companies, or denies to the com-

plainant the equal protection of the law guaranteed to it by
47 the Fourteenth Amendment to the Constitution of the United States. These defendants further aver that even if said Section 1194*a* did operate to discriminate against the complainant, it might be stricken out and Section 1194 would remain a valid and complete enactment, capable of enforcement. They aver that the effect of said Section 1194*a* is not to discriminate against the complainant, and that at the time of the taking effect of said Act of 1905, there was not and is not now any railroad or part of railroad in the State of Missouri, which is not owned and operated by a railroad company.

They deny that said Act fixes rates confiscatory in their nature or unreasonable in amount, or insufficient to permit the complainant to operate its property in Missouri, without loss, or makes it impossible for freight to be carried by the complainant between points in Missouri, at any profit. They deny that all or any part of said Act is contrary to or violative of the provisions of the Constitution of the United States, or of the Fourteenth Amendment thereto. They deny that said Act is invalid, as alleged in paragraph XII or paragraph XIII of said bill of complaint, or that it is violative of said Fourteenth Amendment to the Constituion of the United States. They deny that the provision of said Act, that in computing the rate of freight, the distance shall be computed from the point where it is received to the point of destination in the State, notwithstanding it may pass from one road to another, impairs the complainant's freedom of contract or fixes a rate for it based upon carriage over the line of another road, or that thereby any provision of the Federal Constitution or of any amendment thereto is violated, or that the freedom of contract guaranteed by Section 4 of Article 2 of the State Constitution, is denied.

48 IX.

These defendants have no knowledge, information or belief as to the number of miles of railroad which the complainant has in its entire system, or whether the whole of it, or that portion of it in Missouri was constructed and fairly acquired at a fair and reasonable cost, or whether it was judiciously located, or whether it has at all times or ever been properly or economically operated, or whether its capitalization in bonds and stocks aggregate the amount per mile for its entire system stated in the complainant's bill of complaint, or whether its capitalization is fair or reasonable or less than the amount for which its road could be reproduced or whether its fixed charges are no more than would be required to produce or acquire the property, its equipment, facilities and terminals.

Whether the complainant's lines in Missouri secure and receive a due, fair and reasonable proportionate benefit of the entire system, or the value of the property in Missouri, or its capacity for serving the public is proportionately increased or augmented thereby, or whether the cost of constructing or replacing its railroad in Missouri, and providing and furnishing its equipment and terminals, or of constructing and replacing its entire system to-day would exceed its

original cost, these defendants have no knowledge, information or belief. They deny that the complainant has only been able in the past to have any kind of returns upon the value of its property because it was operated as a part of a whole system or that the rates fixed in said Act of 1905 are unjust or unfair or unreasonable.

49 X.

These defendants admit that the rates, at the time of the filing of said bill of complaint and now charged by the complainant for State shipments on some of the classes of freight mentioned in said Act of 1905, were and are, in some cases, in excess of the maximum therein fixed, but they are informed and believe that as to some of the Commodities mentioned in said Act, the rates so charged by the complainant were and are less than the maximum rates fixed by said Act. They deny that if charges for the classes of freight mentioned in said Act of 1905 should be made by the complainant at the maximum rates fixed in said Act, the complainant would be required to do such business without profit or at any loss, or without return from its investment in this State. They deny that the rates fixed in said Act are unjust or unreasonably low or confiscatory in their nature, or that they will not make a return upon the investment in the property of complainant in this State, or that the gross receipts of all the State business which the complainant does, can or will do in Missouri, when charging the maximum rates fixed by the Act of 1905, for the classes of freight therein mentioned, will not be sufficient to pay the operating expenses and the cost of doing such business in the State, or that there will not be left any sum as profit or return upon the value of the property of the complainant devoted to the use of such business in this State.

They deny that the Maximum rates for any class of freight mentioned in said Act of 1905, are not sufficient to pay the cost of the carriage thereof.

50 XI.

These defendants have no knowledge, information or belief as to the amount of the total earnings of the complainant from local or State freight business in Missouri for the last three years or any one of them, or whether they were or were not in excess of the amounts stated in paragraph XI of complainant's bill of complaint They deny that the expense of doing such local and State business for said three years or for any one of them, was in excess of the complainant's earnings therefrom in the amounts mentioned in the said bill of complaint, or of any amount whatever.

These defendants have no knowledge, information or belief as to whether any reduction in rates under said Act of 1905, will not increase the local traffic, or whether the volume of State and local business will not be more in 1905 than it was in 1904, or as to whether the expense of doing such business will be as great, or whether, if such business should increase, there would be a proportionate increase in such expense. These defendants have no knowl-

edge, information or belief as to whether the value of that part of the complainant's property in Missouri, used in doing State and local business, is not less than $4,327,703., or what is the value of such part of the complainant's property.

These defendants deny that if the complainant for the classes of freight mentioned in said Act of 1905, should charge the maximum rates therein fixed, its total gross receipts from local or State traffic in Missouri, would be reduced so as not to exceed $114,509.10 per annum. Whether the expense of doing the business, in such case, will or will not be lessened, these defendants have no knowledge, information or belief.

51 They deny that any reduction of rates attempted by said Act of 1905, is unfair or unjust, or that it fails to give a fair return on the investment in the complainant's property or that the enforcement of said Act will compel the emplainant to do its local and State business in such a way as not to permit it to make a fair and reasonable profit thereon.

XII.

These defendants admit that the companies mentioned in paragraph XII of the complainant's bill of complaint carry the classes of freight mentioned in said Act, and that they claim that the maximum rates thereby fixed are confiscatory in their nature, and if charged, would result in their doing their State business without any profit. But these defendants deny that such claim is, in point of fact, true.

These defendants deny that the maximum rates fixed by said Act of 1905, are unreasonably low as against any of said companies or that they will not permit any of them to make a profit upon their State business, or that for that reason said Act is invalid as against said companies.

They deny that said Act, if held valid as to complainant, is unconstitutional because of any alleged discrimination between the complainant and any other persons or corporations operating railroads in this State. They aver that the only discrimination of which the complainant will be allowed to complain, is a discrimination against itself in favor of some other person or corporation; and they deny that any of the provisions of the Constitution of the United States or of any of the amendments thereto, are in any respect violated by said Act.

52 ## XIII.

Further answering and with special reference to the averments of paragraph XIII of the complainant's bill of complaint, these defendants deny that said Act of 1905 fixes and establishes maximum rates which are unjust, or unreasonable or unconstitutional, for any reason.

These defendants have no knowledge, information or belief as to whether the cost of transporting live stock is greater than that of any of the other commodities mentioned in said Act, or whether the

same reduces the rate on said live stock on an average of 27 per cent, or whether the reduction in rates on salt and cement is only 16¼ per cent, or in the case of lumber, lath and shingles, 15 per cent. They have no knowledge, information or belief as to whether the different articles transported on complainant's railway have been arranged in classes, according to cost, of carriage, price, risk or injury, bulk, volume of traffic, or any other circumstances, or have remained in substantially the same classes for any period of time, or whether the same has been recognized approved or enacted into law by any statutory classification in effect in Missouri.

They deny that any reduction in rates upon articles affected by the said Act of 1905, is unequal, or partial, or arbitrary as compared with any other commodities or as between the commodities included in said Act. Or that the same works any injustice between shippers, purchasers or manufacturers of the State of Missouri, or deprives them of their property without due process of law or deprives them of the equal protection of the laws, or operates to deprive the complainant of its property without due process of law,
53 or deprives the complainant of the equal protection of the laws by any of the methods or for any of the reasons mentioned in said paragraph XIII of the bill of complaint. They deny that the legislature had or has established maximum rates of charges for the transportation of all kinds of property or that even if the legislature had done so, any change effected in such rates by said Act of 1905, is presumably unfair or unreasonable in any respect. They deny that the legislature requires the complainant to discriminate in favor of any persons or shippers, or to give them a right of transportation for a less rate than the general rate heretofore fixed by any law; or that such rate is less than is just and reasonable in view of the cost to the carrier and the value of the service rendered to the shipper.

XIV.

These defendants, further answering, say that they are informed and believe that this complainant and seventeen other railroad companies or corporations, owning and operating lines of railroad in the State of Missouri, immediately after the approval of said Act of 1905, agreed and came to an understanding with each other, that none of them would comply with the provisions thereof, or transport the commodities named in said Act at the rates mentioned therein, or make any effort to revise their schedules of rates for transporting the commodities mentioned in said Act and other commodities transported by them, in such a manner as to yield obedience to said Act and at the same time derive a reasonable profit upon the fair valuation of their property necessary to carry on their intra-State business, but determined, on concerted action among themselves, to disobey said Act, to deny its validity and
54 any obligation on their part to comply with it, and to bring suits, each of them for itself, on the day said Act should take effect, to enjoin the officers of the State from taking any action or discharging any duties which might be imposed upon them by law in respect to said Act, and for the further purpose of obtaining a

decree of this court adjudging said Act to be null and void upon the grounds stated in this complainant's bill of complaint.

These defendants further aver that in pursuance of said agreement and understanding, this complainant and the said seventeen other companies or corporations did, on the 16th day of June, 1905, each for itself, file in this court its bill of complaint, all of them being upon substantially the same grounds as those stated in this complainant's bill of complaint and praying for substantially the same relief, and did, on the same day, in each of said suits, obtain from this court a restraining order, directed to and which was served upon these defendants and the Attorney General of the State of Missouri, and certain persons designated in said bills of complaint as shippers, enjoining these defendants and the Attorney General from performing any of the duties imposed upon them as State officers, by law, looking to the enforcement of the provisions of said Act, (for the express terms of which said order these defendants pray leave to refer to the same as it appears in the record of this cause), and afterwards, while said restraining order was in force, did obtain from this court a preliminary injunction in the terms of said order, which said preliminary injunction is still operative.

These defendants say that they are informed and believe that the rates fixed by said Act of 1905, do not affect all the articles of freight transported by the complainant in its intra-State traffic, but that a very large number of articles, and a very large part of its
55 intra-State traffic remain wholly unaffected and unregulated as to rates, by said Act or by any other existing statute. And these defendants say that the question of whether rates are compensatory or otherwise, can only be determined upon a consideration of a schedule of rates which shall embrace every article and all the freight transported by the complainant in carrying on its intra-State business.

These defendants are informed and believe that the complainant, if it had chosen to do so, instead of attacking the reasonableness or fairness of the rates upon the few articles mentioned in the Act of 1905, might have revised its schedule or tariff of rates upon all the articles of freight transported by it in carrying on its intra-State traffic, including those mentioned in said Act of 1905, in such a manner that the rates for carrying the articles not mentioned in said Act, would have been not unreasonable or unjust, either to itself or to the public, and that the income derived by the complainant for performing the service of transporting freight at the rates and charges fixed in such a schedule, would have been sufficient to assure to the complainant a fair and reasonable return upon the fair value of its property necessarily employed in the carrying on of such intra-State business.

These defendants further aver that the complainant afforded to these defendants, as a Board of Railroad Commissioners, no opportunity, after said Act of 1905 took effect, to revise, adjust and fix a schedule of rates upon all the articles of freight transported by the complainant in its intra-State traffic, including those mentioned in said Act of 1905, in such a manner that the provisions of said Act

of 1905 would be observed, and at the same time the rates upon all other articles not mentioned in said Act, should be not unreasonable or unjust, either to the complainant or to the public.

56 These defendants further say that if the complainant had failed to so revise or to attempt to so revise its schedules, these defendants, as such Board, would, if they had been given the opportunity, which was denied to them by the injunction in this cause, in the discharge of the duties imposed on them by law, have attempted to fix and establish such a schedule of rates upon all the articles of freight transported by the complainant in its intra-State traffic, as would have observed or complied with the provisions of said Act of 1905, and in other respects have been not unjust or unfair either to the complainant or to the public, and they believe that they could have done so.

These defendants further say that by the issue of the restraining order and the preliminary injunction in this cause, they have been prevented from fixing any such schedule or attempting to fix a schedule of rates which should be just to the complainant and to the shippers; that the complainant, by the filing of its bill before these defendants, as such Board could lawfully act in the premises, has unwarrantably assumed that these defendants, as such Board, would fix and establish a schedule of rates which would be unjust to the complainant.

These defendants say that in view of the statutes of this State, which define the duties to be discharged by them, as such Board, this action ought not to be maintained, because it was brought before these defendants had any opportunity to discharge any of such duties or act in the matter of a general revision of the schedule of rates, made necessary by said Act of 1905.

These defendants deny that the complainant is entitled to
57 any relief whatever against these defendants, without this, that any other matter, cause or thing in the complainant's said bill of complaint, or amendments thereto, contained, material or necessary for these defendants to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided, or denied, is true to the knowledge or belief of these defendants; all which matters and things these defendants are ready and willing to aver, maintain and prove, as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
Assistant Attorney General;
Solicitors for Defendants.

SANFORD B. LADD,
Of Counsel.

Afterwards, to-wit, on the 1st day of December, 1905, the
58 Answer of Herbert S. Hadley, Attorney General, was filed. Said Answer is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3006.

THE CHICAGO AND ALTON RAILWAY COMPANY, Complainant,

vs.

JOHN A. KNOTT, JOSEPH P. RICE and FRANK A. WIGHTMAN, Railroad Commissioners of the State of Missouri; Herbert S. Hadley, Attorney General of the State of Missouri; William T. Kemper, and Alexander McKenzie, Defendants.

The Answer of Herbert S. Hadley, Attorney General of the State of Missouri, One of the Defendants, to the Bill of Complaint of the Chicago and Alton Railway Company, Complainant.

This defendant, now and at all times hereafter saving to himself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for him to make answer to, answering says:

I.

He admits the averments of the paragraph numbered I of the complainant's bill of complaint, except in the following particular: He says that he has no knowledge, information or belief as to whether the mileage of the railroads owned and operated by it in Mis-
59 souri, amounts in the aggregate to two hundred and sixty-three and one-half (263½) miles.

II.

This defendant admits that this cause arises under the Constitution and Laws of the United States; but he denies that said Act of 1905 is unconstitutional or violative of the provisions of the Constitution of the United States or of the Fourteenth Amendment thereto, or contrary to the laws of the United States. He admits that the matter and amount in dispute exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars ($2,000).

III.

He admits that the defendants John A. Knott, Joseph R. Rice and Frank A. Wightman, constitute the Board of Railroad Commissioners of the State of Missouri, and that this defendant is the Attorney General of the State of Missouri, but he denies that either they or this defendant are required by law to do or perform the special duties mentioned in said bill of complaint, except as in this answer hereinafter admitted.

IV.

He admits that the other defendants are citizens and residents, respectively, of the State of Missouri, and of the counties of said State mentioned in paragraph IV of said bill of complaint; but whether each or any of them are engaged in shipping over the complainant's road or other roads in the State of Missouri, any of the commodities mentioned in the Act of 1905, or whether they represent any class of shippers, this defendant has no knowledge, information or belief.

60

V.

He admits that paragraph V of the complainant's bill of complaint correctly sets out Sections 1191, 1192 and 1193 of the Revised Statutes of Missouri of 1899, and that Section 1194 of said Revised statutes fixed the maximum rates for the classes of freight designated in said Section 1193, as Classes D, E, F, G, H, I and J, respectively. He admits that the statutes of the State provide for the election and qualification of Railroad Commissioners, and prescribes their special duties, and as to the allegations in paragraph V of said bill of complaint, regarding the special duties imposed upon them, and upon the Attorney General and Prosecuting Attorneys by the statutes of the State, he avers that Articles II and IV of Chapter 12 of the Revised Statutes of Missouri of 1899, and an Act of the General Assembly of the State of Missouri, entitled "An Act to amend Chapter 12 of the Revised Statutes of the State of Missouri of 1899, entitled 'Corporations, private,' by adding two new sections after Section 1194, to be known as Sections 1194*a* and 1194*b*, providing that the board of railroad and warehouse commissioners shall fix, maintain, establish, reduce and modify freight rates upon all railroads in this state, and providing for the manner of so doing and enforcing the same," approved April 6, 1903, published in the "Laws of Missouri passed at the Session of the Forty-second General Assembly," at page 132, of which said statutes and Act this court will take judicial notice, prescribe particularly all the duties imposed by law upon those defendants, constituting the Board of Railroad Commissioners, and upon the Attorney General, and prosecuting attorneys, respecting freight rates and the enforcement of any laws of this State governing or affecting the same; and he prays leave to refer to said statutes and said

61 Act, and that the same may be considered in connection with this answer with like effect as if they had been fully set out herein.

VI.

This defendant admits the passage by the Legislature of the State of Missouri of an Act approved April 6, 1903, and that said Act is correctly set out in paragraph VI of said bill of complaint.

VII.

This defendant admits the passage by the Legislature of the State of Missouri of the Act approved April 15, 1905, and that said Act is correctly set out in paragraph VII of said bill of complaint. He ad-

mits that said last named Act took effect on the 16th day of June, 1905; that the rates at the time of the filing of said bill of complaint being charged by the complainant for the transportation of freight of the character mentioned in said last named Act, were shown in schedules on file with the Railroad Commissioners; but this defendant denies that said rates so charged by complainant were, as respects all the freight of the character mentioned in said Act, in excess of the maximum rates fixed by said Act of 1905.

He admits that as to some of the commodities mentioned in said Act, the same would require some reduction in the rates charged by the complainant for the transportation thereof at the time of the filing of said bill of complaint, and that such reduction would make necessary a change in the schedules so filed by the complainant with the Railroad Commissioners; but this defendant denies that
62 such change could not and cannot be made by the complainant without jeopardizing its property interests. This defendant denies that said Railroad Commissioners had at or before the filing of said bill of complaint, threatened to enforce the provisions of said Act of 1905 by entering upon investigations, either upon the instigation of the Board of Railroad Commissioners or on the complaint of shippers or by determining or adjudging complainant's then existing schedule of rates to be unreasonable, unjust or extortionate, or by requiring the complainant, under pain of any penalties, to file or publish a new schedule fixing rates not in excess of those mentioned in said Act of 1905; and he denies that they proposed to do any of said things. He denies that they proposed to file, post or publish, as the complainant's schedule, the maximum rates fixed in said Act of 1905, if the complainant should refuse to do so, or to direct any prosecuting attorney to prosecute or recover of complainant any penalties, or to direct the Attorney General to assist in any such prosecution, or to recover any penalties for the complainant's failure to comply with the orders which they proposed from time to time to make in investigations instituted for the enforcement of said Act of 1905. He denies that at that time they proposed to make any such investigations. On the contrary, this defendant avers that when this suit was begun the time had not arrived at which said Railroad Commissioners could take any action whatever under or in pursuance of said Act of 1905, and that they were not at that time proposing, because the time had not then arrived, when they, as such Board of Railroad Commissioners, could properly or lawfully propose any action in the premises. They had not, as a Board, determined or considered the course proper to be pursued by them in respect of the matter when said Act of 1905, should have taken effect. He denies that any prosecuting at-
63 torney or the Attorney General would have conducted such prosecutions or sought to recover any such penalties.

As to whether shippers along the line of the complainant's railroad were then and are now numerous, or engaged daily or at all in making or receiving shipments to or from points in the State of Missouri, of any freight of the special classes designated in said Act of 1905, this defendant has no knowledge, information or belief. He denies that any such shippers or shipper would have or

will institute suits to recover of the complainant any damages or attorney's fees for charging rates higher than those fixed by said Act of 1905.

Whether any other shippers in the counties in the State where the complainant's line of road extends, are interested with those named as defendants herein this defendant has no knowledge, information or belief; but he denies that any shipper or other person not named as a defendant in this action can or will be bound by any decree which may be entered herein.

VIII.

This defendant denies that said Act of 1905 is invalid or inoperative or of no force or effect for any of the reasons mentioned in paragraph VIII of the complainant's said bill of complaint. He denies that said law as it now stands is uncertain, as averred in subdivision (*e*) of Paragraph VIII of the complainant's bill of complaint, for the reason stated therein, or for any other reason, or that said Act of 1905 is invalid because of any reason stated in said subdivision (*e*). He denies that said Section 1194*a* is a discrim-
64 ination between individuals and companies, or denies to the complainant the equal protection of the law guaranteed to it by the Fourteenth Amendment to the Constitution of the United States. This defendant further avers that even if said Section 1194*a* did operate to discriminate against the complainant, it might be stricken out and Section 1194 would remain a valid and complete enactment, capable of enforcement. He avers that the effect of said Section 1194*a* is not to discriminate against the complainant, and that at the time of the taking effect of said Act of 1905, there was not and is not now any railroad or part of railroad in the State of Missouri, which is not owned and operated by a railroad company.

He denies that said Act fixes rates confiscatory in their nature or unreasonable in amount, or insufficient to permit the complainant to operate its property in Missouri, without loss, or makes it impossible for freight to be carried by the complainant between points in Missouri, at any profit. He denies that all or any part of said Act is contrary to or violative of the provisions of the Constitution of the United States, or of the Fourteenth Amendment thereto. He denies that said Act is invalid, as alleged in Paragraph XII or paragraph XIII of said bill of complaint, or that it is violative of said Fourteenth Amendment to the Constitution of the United States. He denies that the provision of said Act, that in computing the rate of freight, the distance shall be computed from the point where it is received to the point of destination in the State, notwithstanding it may pass from one road to another, impairs the complainant's freedom of contract or fixes a rate for it based upon carriage over the line of another road, or that thereby any provision of the
65 Federal Constitution or of any amendment thereto is violated, or that the freedom of contract guaranteed by Section 4 of Article II of the State Constitution, is denied.

IX.

This defendant has no knowledge, information or belief as to the number of miles of railroad which the complainant has in its entire system, or whether the whole of it, or that portion of it in Missouri was constructed and fairly acquired at a fair and reasonable cost, or whether it was judiciously located, or whether it has at all times or ever, been properly or economically operated, or whether its capitalization in bonds and stocks aggregate the amount per mile for its entire system stated in the complainant's bill of complaint, or whether its capitalization is fair or reasonable or less than the amount for which its road could be reproduced, or whether its fixed charges are no more than would be required to produce or acquire the property, its equipment, facilities and terminals.

Whether the complainant's lines in Missouri secure and receive a due, fair and reasonable proportionate benefit of the entire system, or the value of the property in Missouri, or its capacity for serving the public is proportionately increased or augmented thereby, or whether the cost of constructing or replacing its railroad in Missouri, and providing and furnishing its equipment and terminals, or of constructing and replacing its entire system to-day would exceed its original cost, this defendant has no knowledge, information
66 or belief. He denies that the complainant has only been able in the past to have any kind of returns upon the value of its property because it was operated as a part of a whole system or that the rates fixed in said Act of 1905 are unjust or unfair or unreasonable.

X.

This defendant admits that the rates, at the time of the filing of said bill of complaint and now charged by the complainant for State shipments on some of the classes of freight mentioned in said Act of 1905, were and are, in some cases, in excess of the maximums therein fixed; but he is informed and believes that as to some of the commodities mentioned in said Act, the rates so charged by the complainant were and are less than the maximum rates fixed by said Act. He denies that if charges for the classes of freight mentioned in said Act of 1905 should be made by the complainant at the maximum rates fixed in said Act, the complainant would be required to do such business without profit or at any loss, or without return from its investment in this State. He denies that the rates fixed in said Act are unjust or unreasonably low or confiscatory in their nature, or that they will not make a return upon the investment in the property of complainant in this State, or that the gross receipts of all the State business which complainant does, can or will do in Missouri, when charging the maximum rates fixed by the Act of 1905, for the classes of freight therein mentioned, will not be sufficient to pay the operating expenses and the cost of doing such business, in the State, or that there will not be left any sum as profit or return upon the value of the property of the
67 complainant devoted to the use of such business in this State. He denies that the maximum rates for any class of freight

mentioned in said Act of 1905, are not sufficient to pay the cost of the carriage thereof.

XI.

This defendant has no knowledge, information or belief as to the amount of the total earnings of the complainant from local or state freight business in Missouri for the last three years or any one of them, or whether they were or were not in excess of the amounts stated in paragraph XI of complainant's bill of complaint. He denies that the expense of doing such local and State business for said three years or for any one of them, was in excess of the complainant's earnings therefrom in the amounts mentioned in the said bill of complaint or of any amount whatever.

This defendant has no knowledge, information or belief as to whether any reduction in rates under said Act of 1905, will not increase the local traffic, or whether the volume of State and local business will not be more in 1905 than it was in 1904, or as to whether the expense of doing such business will be as great, or whether, if such business should increase, there would be a proportionate increase in such expense. This defendant has no knowledge, information or belief as to whether the value of that part of the complainant's property in Missouri, used in doing State and local business, is not less than $4,327,703, or what is the value of such part of the complainant's property.

This defendant denies that if the complainant for the classes of freight mentioned in said Act of 1905, should charge the
68 maximum rates therein fixed, its total gross receipts from local or State traffic in Missouri, would be reduced so as not to exceed $114,509.10 per annum. Whether the expense of doing the business, in such case, will or will not be lessened, this defendant has no knowledge, information or belief.

He denies that any reduction of rates attempted by said Act of 1905, is unfair or unjust, or that it fails to give a fair return on the investment in the complainant's property, or that the enforcement of said Act will compel the complainant to do its local and State business in such a way as not to permit it to make a fair and reasonable profit thereon.

XII.

This defendant admits that the companies mentioned in paragraph XII of the complainant's bill of complaint carry the classes of freight mentioned in said Act; and that they claim that the maximum rates thereby fixed are confiscatory in their nature, and if charged, would result in their doing their State business without any profit. But this defendant denies that such claim is, in point of fact, true.

This defendant denies that the maximum rates fixed by said Act of 1905, are unreasonably low as against any of said companies or that they will not permit any of them to make a profit upon their State business, or that for that reason said Act is invalid as against said companies.

He denies that said Act, if held valid as to complainant, is un-

constitutional because of any alleged discrimination between the complainant and any other persons or corporations operating railroads in this State. He avers that the only discrimination of which the complainant will be allowed to complain, is a discrimination against itself in favor of some other person or corporation;
69 and he denies that any of the provisions of the Constitution of the United States or of any of the amendments thereto, are in any respect violated by said Act.

XIII.

Further answering and with special reference to the averments of paragraph XIII of the complainant's bill of complaint, this defendant denies that said Act of 1905 fixes and establishes maximum rates which are unjust, or unreasonable or unconstitutional, for any reason.

This defendant has no knowledge, information or belief as to whether the cost of transporting livestock is greater than that of any of the other commodities mentioned in said Act; or whether the same reduces the rate on said livestock on an average of 27 per cent, or whether the reduction in rates on salt and cement is only 16¼ per cent, or in the case of lumber, lath and shingles, 15 per cent. He has no knowledge, information or belief as to whether the different articles transported on complainant's railway have been arranged in classes, according to cost, of carriage, price, risk of injury, bulk, volume of traffic, or any other circumstances, or have remained in substantially the same classes for any period of time, or whether the same has been recognized, approved or enacted into law by any statutory classification in effect in Missouri.

He denies that any reduction in rates upon articles affected by the said Act of 1905, is unequal, or partial, or arbitrary as compared with any other commodities or as between the commodities included in said Act. Or that the same works any injustice between shippers, purchasers or manufacturers of the State of Mis-
70 souri, or deprives them of their property without due process of law or deprives them of the equal protection of the laws, or operates to deprive the complainant of its property without due process of law, or deprives the complainant of the equal protection of the laws by any of the methods or for any of the reasons mentioned in said paragraph XIII of the bill of complaint. He denies that the legislature had or has established maximum rates of charges for the transportation of all kinds of property or that even if the legislature had done so, any change effected in such rates by said Act of 1905, is presumably unfair or unreasonable in any respect. He denies that the legislature requires the complainant to discriminate in favor of any persons or shippers, or to give them a right of transportation for a less rate than the general rate heretofore fixed by any law; or that such rate is less than is just and reasonable in view of the cost to the carrier and the value of the service rendered to the shipper.

XIV.

This defendant further answering avers that he is not a proper party defendant to the said bill of complaint and that the same is wholly without equity as against this defendant.

XV.

This defendant further answering says that he is informed and believes that this complainant and seventeen other railroad companies or corporations, owning and operating lines of railroad in the State of Missouri, immediately after the approval of said Act of 1905, agreed and came to an understanding with each other, that none of them would comply with the provisions thereof, or
71 transport the commodities named in said Act at the rates mentioned therein, or make any effort to revise their schedules of rates for transporting the commodities mentioned in said Act and other commodities transported by them, in such a manner as to yield obedience to said Act and at the same time derive a reasonable profit upon the fair valuation of their property necessary to carry on their intra-State business, but determined, on concerted action among themselves, to disobey said Act, to deny its validity and any obligation on their part to comply with it, and to bring suits, each of them for itself, on the day said Act should take effect, to enjoin the officers of the State from taking any action or discharging any duties which might be imposed upon them by law in respect of said Act, and for the further purpose of obtaining a decree of this court adjudging said Act to be null and void upon the grounds stated in this complainant's bill of complaint.

This defendant further avers that in pursuance of said agreement and understanding, this complainant and the said seventeen other companies or corporations did, on the 16th day of June 1905, each for itself, file in this court its bill of complaint, all of them being upon substantially the same grounds as those stated in this complainant's bill of complaint and praying for substantially the same relief, and did, on the same day, in each of said suits, obtain from this court a restraining order, directed to and which was served upon the members of said Board of Railroad Commissioners and this defendant and certain persons designated in said bills of complaint as shippers enjoining this defendant and said Board from performing any of the duties imposed upon them as State officials by law, looking to the enforcement of the provisions of said
72 Act (for the express terms of which said order this defendant prays leave to refer to the same as it appears in the record of this cause) and afterwards, while said restraining order was in force, did obtain from this court a preliminary injunction in the terms of said order, which said preliminary injunction is still operative.

This defendant says that he is informed and believes that the rates fixed by said Act of 1905, do not affect all the articles of freight transported by the complainant in its intra-State traffic, but that a very large number of articles, and a very large part of

its intra-state traffic remain wholly unaffected and unregulated as to rates, by said Act or by any other existing statute. And this defendant says that the question of whether rates are compensatory or otherwise, can only be determined upon a consideration of a schedule of rates which shall embrace every article and all the freight transported by the complainant in carrying on its intra-State business.

This defendant is informed and believes, that the complainant, if it has chosen to do so, instead of attacking the reasonableness or fairness of the rates upon the few articles mentioned in the Act of 1905, might have revised its schedule or tariff of rates upon all the articles of freight transported by it in carrying on its intra-state traffic, including those mentioned in said Act of 1905, in such a manner that the rates for carrying the articles not mentioned in said Act, would have been not unreasonable or unjust, either to itself or to the public, and that the income derived by the complainant for performing the service of transporting freight at the rates and charges fixed in such a schedule, would have been sufficient to assure to the complainant a fair and reasonable return upon the fair value of its property necessarily employed
73 in the carrying on of such intra-State business.

This defendant further avers that the complainant afforded to the Board of Railroad Commissioners no opportunity, after said Act of 1905 took effect to revise, adjust and fix a schedule of rates upon all the articles of freight transported by the complainant in its intra-state traffic, including those mentioned in said Act of 1905, in such a manner that the provisions of said Act of 1905 would be observed, and at the same time the rates upon all other articles not mentioned in said Act, should not be unreasonable or unjust, either to the complainant or to the public.

This defendant is informed and believes that if the complainant had failed to so revise or to attempt to so revise its schedules, the members of such Board would if they had been given the opportunity, which was denied to them by the injunction in this cause, in the discharge of the duties imposed on them by law, have attempted to fix and establish such a schedule of rates upon all the articles of freight transported by the complainant in its intra-state traffic, as would have observed or complied with the provisions of said Act of 1905, and in other respects have been not unjust or unfair either to the complainant or to the public, and he believes that they could have done so.

This defendant further says that by the issue of the restraining order and the preliminary injunction in this cause, the members of the Board have been prevented from fixing any such schedule or attempting to fix a schedule of rates which should be just to the complainant and to the shippers; that the complainant, by the filing of its bill before they, as such Board, could lawfully act in
74 the premises, has unwarrantably assumed that these defendants, as such Board, would fix and establish a schedule of rates which would be unjust to the complainant.

This defendant says that in view of the statutes of this State,

which define the duties to be discharged by them as such Board, this action ought not to be maintained, because it was brought before they had any opportunity to discharge any of such duties or act in the matter of a general revision of the schedule of rates, made necessary by said Act of 1905.

This defendant denies that the complainant is entitled to any relief whatever against this defendant, without this, that any other matter, cause or thing in complainant's said bill of ,complaint or amendments thereto, contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided, or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
Assistant Attorney General,
Solicitors for Defendants.

SANFORD B. LADD, *Of Counsel.*

75 Afterwards, to-wit, on the 2nd day of December, 1905, the Joint Answer of Wm. T. Kemper and Alexander McKenzie was filed. Said Joint Answer is in words and figures as follows, to-wit:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

THE CHICAGO & ALTON RAILWAY COMPANY, Complainant.
vs.
JOHN A. KNOTT, JOSEPH P. RICE, AND FRANK A. WIGHTMAN, Railroad Commissioners of the State of Missouri; Herbert S. Hadley, Attorney General of the State of Missouri; William T. Kemper and Alexander McKenzie, Defendants.

The Joint and Several Answer of the Defendants William T. Kemper and Alexander McKenzie, to the Bill of Complaint of the Chicago & Alton Railway Company, Complainant.

These defendants respectively, now and at all times hereafter saving to themselves and each of them all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto or to so much thereof as these defendants and each of them are advised it is material or necessary for them and each of them to make answer to, answering, say, each one of them for himself or itself:

I.

They admit the averments contained in paragraph I. of said bill of complaint.

II.

As to whether said Act of 1905 is unconstitutional for any reason these defendants have no knowledge, information
76 or belief. All the other averments of paragraph II. of said bill of complaint, these defendants admit.

III.

They admit each and every of the averments contained in paragraph III. of said bill of complaint, except in this respect: Neither of these defeda-ts has any knowledge, information or belief as to the duties which the Railroad Commissioners or the Attorney General are required by law to do or perform.

IV.

They admit the averments contained in paragraph IV. of the bill of complaint, except in this particular: They have no knowledge, information or belief as to whether they or any one of them represents any class of shippers.

V.

They admit all the averments contained in paragraph V. of the bill of complaint, with these exceptions, to-wit: They have no knowledge, information or belief as to what the statutes of the State provide in respect of the duties of the Railroad Commissioners, or of any prosecuting attorney or of the Attorney General.

VI.

They admit each and every of the averments of paragraph VI. of the bill of complaint.

VII.

They admit that the legislature of the State of Missouri, at its session of 1905, passed the act called in said bill of complaint
77 the Act of 1905.

As to whether shippers along the line of complainant's railroad are numerous, or daily engaged in making or receiving shipments of freight of the special classes designated in the Act of 1905, these defendants have no knowledge, information or belief.

They deny that they were intending or proposing to institute against the complainant any suit whatever to recover of the complainant any damages or any attorneys' fees.

They have no information, knowledge or belief as to whether any other shipper is interested with these defendants, or any of them, and they deny that they, or any one of them, should defend for any such person.

As to each and every other allegation contained in said paragraph VII. of the bill of complaint, these defendants say that they have no knowledge, information or belief.

VIII.

As to the truth of the averments and of each of them contained in paragraph VIII. of said bill of complaint, these defendants say that they have no knowledge, information or belief.

IX.

These defendants have no knowledge, information or belief as to the truth of the averments or any of them contained in paragraph IX. of the bill of complaint.

X.

These defendants have no knowledge, information or belief as to the truth of the averments, or any of them, contained in paragraph X. of the bill of complaint.

XI.

These defenda-ts have no knowledge, information or belief as to the truth of the averments, or any of them, contained in paragraph XI. of the bill of complaint.

78 XII.

These defendants have no knowledge, information or belief as to the truth of the averments, or any of them, contained in paragraph XII of the bill of complaint.

XIII.

These defendants have no knowledge, information or belief as to the truth of the averments, or any of them, contained in paragraph XIII of the bill of complaint.

XIV.

These defendants, further answering, say that none of them are proper parties defendant to the said bill of complaint and that each one of them has been improperly joined as a defendant herein; that there is no equity in said bill as against any one of them, and that in any event no costs ought to be adjudged herein against any of them.

These defendants deny that the complainant is entitled to any relief whatever against these defendants, or any of them without this, that any other matter, cause or thing in the complainant's said bill of complaint or amendments thereto contained, material or necessary for these defendants to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed

and avoided or denied, is true to the knowledge or belief of these defendants; all which matters and things these defendants are ready and willing to aver, maintain and prove, as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
Assistant Attorney General;
Solicitors for Defendants.

SANFORD B. LADD,
Of Counsel.

79 In order to avoid unnecessarily encumbering the record it is agreed that admissions, denials and averments of want of knowledge, information and belief, contained in the foregoing answer, shall be taken and considered in every stage of this suit, with the same force and effect as if such admissions, denials or averments had mentioned specifically and in the language of the bill of complaint, the allegations thereof, which they are respectively intended to meet, that such admissions, denials and averments as to a number of allegations, as a whole, contained in the bill of complaint, shall have the same force and effect as if each of such allegations had been specifically referred to in the language of said bill of complaint.

FRANK HAGERMAN,
Solicitor for Complainant.
HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
Assistant Attorney General;
Solicitors for Defendants.

——— ———,
Of Counsel.

80 Afterwards, to-wit, on the 17th day of February, 1906, the Replication to the Joint Answer of John A. Knott, Joseph P. Rice and Frank A. Wightman was filed. Said replication is in words and figures as follows, to-wit:

In the United States Circuit Court for the Western Division of the Western District of Missouri.

In Equity. No. 3006.

THE CHICAGO & ALTON RAILWAY COMPANY, Complainant,
vs.
JOHN A. KNOTT et al., Defendants.

Replication of Complainant to the Answer of John A. Knott, Joseph P. Rice, and Frank A. Wightman, Railroad Commissioners.

This replicant, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendants, for replication thereunto said that it doth and will aver, maintain, and prove its said bill to be true, certain and sufficient in the law to be replied unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this honorable Court shall direct, and prays as in and by its said bill it hath already prayed.

EDWARD L. SCARRITT,
FRANK HAGERMAN,
Solicitors for Complainant.

Received a copy of the foregoing replication, and it may be filed as of proper time.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
SANFORD B. LADD,
Solicitors for said Defendants.

81 Afterwards, to-wit, on the 17th day of February, 1906, the Replication to the Answer of Herbert S. Hadley, Attorney General, was filed. Said replication is in words and figures as follows:

In the United States Circuit Court for the Western Division of the Western District of Missouri.

In Equity. No. 3006.

THE CHICAGO & ALTON RAILWAY COMPANY, Complainant,
vs.
JOHN A. KNOTT et al., Defendants.

Replication of Complainant to the Answer of Herbert S. Hadley, Attorney General.

This replicant, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendant, for replication thereunto said that it doth and will aver, maintain, and prove its said bill to be true, certain and sufficient in the law to be replied unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this honorable Court shall direct, and prays as in and by its said bill it hath already prayed.

EDWARD L. SCARRITT,
FRANK HAGERMAN,
Solicitors for Complainant.

Received a copy of the foregoing replication, and it may be filed as of proper time.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
SANFORD B. LADD,
Solicitors for said Defendants.

82 Afterwards, to-wit, on the 17th day of February, 1906, the Replication to the Answer of Wm. T. Kemper and Alexander McKenzie was filed. Said replication is in words and figures as follows:

In the United States Circuit Court for the Western Division of the Western District of Missouri.

In Equity. No. 3006.

THE CHICAGO & ALTON RAILWAY COMPANY, Complainant,
vs.
JOHN A. KNOTT et al., Defendants.

Replication of Complainant to the Answer of William T. Kemper and Alexander McKenzie, Shippers.

This replicant, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendant, for replication thereunto said that it doth and will aver, maintain, and prove its said bill to be true, certain and sufficient in the law to be replied unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this honorable Court shall direct, and prays as in and by its said bill it hath already prayed.

EDWARD L. SCARRITT,
FRANK HAGERMAN,
Solicitors for Complainant.

Received a copy of the foregoing replication, and it may be filed as of proper time.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
SANFORD B. LADD,
Solicitors for said Defendants.

83 Afterwards, to-wit on the 26th day of February, 1906, a Motion to Refer case to a Master or appoint an Examiner was filed. Said motion is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3006.

THE CHICAGO AND ALTON RAILWAY COMPANY, Complainant,

vs.

JOHN A. KNOTT, JOSEPH P. RICE, and FRANK A. WIGHTMAN, Railroad Commissioners of the State of Missouri; Herbert S. Hadley, Attorney General of the State of Missouri, William T. Kemper and Alexander McKenzie, Defendants.

The defendants, John A. Knott, Joseph P. Rice and Frank A. Wightman, Railroad Commissioners of the State of Missouri, and Herbert S. Hadley, Attorney General of the State of Missouri, pray and move the court to make an order referring this cause to one of the standing Masters of the court or to a special Master to be appointed by the court, under proper directions therefor, to take the evidence herein and report the same to the court, with or without findings of fact by such Master, with all convenient speed, or an order appointing an examiner to take the testimony in the cause and return such testimony into court with all convenient speed.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
Assistant Attorney General,
Solicitors for Defendants.

SANFORD B. LADD,
Of Counsel.

84 Afterwards, to-wit, on the 27th day of February, 1906, a motion for oral hearing in open court was filed. Said motion is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2988.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Complainant,

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, and Joseph P. Rice, John A. Knott and Frank A. Wightman, Railroad Commissioners of the State of Missouri, et al., Defendants.

No. 2989.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Complainant,

vs.

SAME, Defendants.

No. 2990.

THE SL. LOUIS SOUTHWESTERN RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2991.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2992.

THE ST. LOUIS, KANSAS CITY & COLORADO RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2993.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

85 No. 2994.

THE ST. LOUIS & HANNIBAL RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2995.

THE MISSOURI PACIFIC RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2996.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2997.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2998.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 2999.

QUINCY, OMAHA AND KANSAS CITY RAILROAD COMPANY, Complainant,
vs.
SAME, Defendants.

No. 3000.

THE WABASH RAILROAD COMPANY, Complainant,
vs.
SAME, Defendants.

No. 3001.

THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 3002.

KANSAS CITY, CLINTON & SPRINGFIELD RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

86 No. 3003.

CHICAGO GREAT WESTERN RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

No. 3006.

THE CHICAGO & ALTON RAILWAY COMPANY, Complainant,
vs.
SAME, Defendants.

Motion.

Complainant in each one of the above entitled causes moves the court to set this case down for hearing upon evidence to be adduced orally in open court on final hearing.

FRANK HAGERMAN,
Solicitor for Complainants.

The above motion may be treated as if separately made and filed in each of above cases, and due and timely notice thereof is acknowledged.

HERBERT S. HADLEY,
JOHN KENNISH,
SANFORD B. LADD,
Solicitors for the Answering Defendants.

87 Afterwards, to-wit, on the 5th day of March, 1906, the following order was filed and entered of record, to-wit:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO., Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Also

In Equity.

RAILROAD COMPANIES
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003. 3004, and 3006.

Order.

The application, in the nature of a motion, of the complainants for an oral hearing in open court of the evidence herein and the motion of the defendants for a reference to a Master or the appointment of an Examiner to take the testimony herein, having been submitted to the court, and the causes being at issue, the court decides to refer the same to a Special Master.

It is accordingly ordered that the above numbered causes be, and they are hereby referred to Frank L. Scofield, Esq., as Special Master, with directions to take the evidence orally on the issues involved, and to report his findings of facts thereon to the court at the earliest time practicable, together with the evidence in the causes.

(1) He shall so hear, and only until the court otherwise orders, such above numbered causes as the parties by their counsel
88 shall at the beginning of the inquiry agree to be heard.

(2) The Special Master, on reasonable notice, by mail or otherwise, deemed by him most advisable, to the counsel of the respective parties, shall fix the times and places for the taking of testi-

mony and he is authorized to fix the same as to him may seem most convenient to the parties in interest, having regard to the suitability and necessity of such times and places.

(3) The Special Master is authorized to employ a competent and reliable stenographer, whose compensation shall be determined by the court, to take down the testimony and reduce the same to writing.

(4) The court directs that the Special Master shall proceed, after the beginning of the taking of testimony, with all reasonable speed, as it is important to all concerned that the hearing of the causes shall be expedited. To this end, the Special Master will require respective counsel to present their testimony promptly, and confine the same to the issues involved, in order to avoid, as far as practicable, the growing evil in practice before Masters of unduly burdening the record with irrelevant and immaterial matters and the litigants with unnecessary costs.

(5) The Special Master shall permit any pleadings to be amended as by Equity Rule provided, and rule upon the admissibility of any evidence, and may refer to the court any question which arises before him in the progress of the hearing.

(6) The Clerk of this Court will forthwith furnish the said Special Master with a certified copy of this order, and without further or special order turn over to said Special Master, taking his receipt therefor, any pleadings or court papers pertaining to the causes being investigated by him, on his request made therefor.

(Signed) JNO. F. PHILIPS, *Judge.*

89 Afterwards, to-wit, on the 11th day of June, 1907, a motion for leave to file amended and supplemental Bill of Complaint was filed. Said motion is in words and figures as follows, to-wit:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO., Complainant,

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Also

In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

Motion.

Now comes complainant in each of the above entitled causes and moves the court for leave to file an amended and supplemental bill

seeking to enjoin the enforcement of the various acts of the legislature regulating rates adopted at the session in 1907, and making as additional parties defendant H. R. Oglesby, Railroad Commissioner, and the county judges and treasurers of the counties through which each of the complainant's lines run, together with citizens traveling upon the road of each complainant as passengers, all as will be more fully shown by the amended and supplemental bill to be presented upon the hearing of this motion.

FRANK HAGERMAN,
Solicitor for Complainants.

90 Afterwards, to-wit, on the 13th day of June, 1907, the following restraining order was filed and entered of record:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3006.

CHICAGO & ALTON RAILROAD COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Order.

The complainant upon this June 13th, 1907, asked, pending a hearing of the application to file an amended and supplemental bill, the general form of which has been submitted to the court, the right to temporarily file same and for a restraining order, but in as much as said application to file the bill for a temporary injunction has been set and noticed for hearing upon June 14th, 1907, at the first time convenient to the court, and it appearing to the court that it is desirable that a full argument be had after notice, yet that great harm might be done and much confusion arise if the status quo should be changed, and that it is to the best interest of the public and all parties interested that such status quo should be maintained until such hearing, it is therefore, upon the court's own motion, ordered that until further order herein the complainant, its officers, agents and employés be and they are hereby restrained from putting in force the maximum freight and passenger rates provided by the legislative acts of 1907 mentioned in said bill and from com-
91 plying with said acts, and the application for a restraining order will be heard with that for leave to file said amended bill.

(Signed) SMITH McPHERSON, *Judge.*

92 Afterwards, to-wit, on the 14th day of June, 1907, the following order was filed and entered of record, to-wit:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3006.

THE CHICAGO & ALTON RY. CO., Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Order.

The complainant upon this June 14th, 1907, presented its amended and supplemental bill, and asked leave to file the same and for a restraining order or temporary injunction. The Court was advised by the Assistant Attorney General, who appeared, that the Attorney General is absent and desired to be heard, and in the meantime that suits were this day by the Attorney General instituted in the Circuit Courts of the State to require the various railroad companies of the State to put in force the rates fixed by the acts of the Legislature mentioned in the bill. It is thereupon ordered that the matter be set down for hearing upon the 15 day of June, 1907, at 2 o'clock p. m., and the supplemental bill herein shall be deposited with the Clerk. And it appearing to the court that it is desirable that a full hearing be had of the various matters, yet that great harm might be done and much confusion arise if the status quo should be changed, and that it is to the best interest of the public and all parties interested that such status quo should be mainained until such hearing, it is therefore, upon the Court's own motion, again ordered that until further order herein
93 the complainant, its officers, agents, and employés, be and they are hereby restrained from putting in force the maximum freight and passenger rates provided by the legislative acts of 1907 mentioned in said bill and from complying with said acts, and the application for a restraining order and temporary injunction will be heard with that for leave to file said amended bill.

(Signed) SMITH McPHERSON, *Judge.*

94 Afterwards, to-wit, on the 15th day of June, 1907, a Notice was filed. Said Notice is in words and figures as follows:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO., Complainant,

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Also

In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

Notice.

To defendants and their counsel:

Complainants will at the court room at Kansas City, Missouri, upon June 14th, 1907, at ten o'clock A. M., or as soon as counsel can be heard, ask leave of court to file an amended and supplemental bill in each of the foregoing cases, in substantial form shown by copy hereto attached, and at the same time ask for a temporary injunction.

FRANK HAGERMAN,
Solicitor for Complainants.

Received copy of this notice June 11, 1907.
HERBERT S. HADLEY,
Solicitor for Defendants.

95 Afterwards, to-wit, on the 17th day of June, 1907, the following order was filed and entered of record, to-wit:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3006.

THE CHICAGO & ALTON RY. COMPANY, Complainant,

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Order.

This cause came on for hearing this 17th day of June, 1907, the parties appearing by their counsel in response to notice and the court being fully advised in the premises, orders and adjudges:

1. Complainant's motion for leave to file an amended and supplemental bill is sustained and such leave is given, the same to be filed as of June 11th, 1907.

Upon such filing, process shall be issued so that if the court hereafter decides that the ends of justice require, and the rules of equity permit, the said bill may be treated as an amended, supplemental, ancillary, dependent or original bill.

To said bill, each of the parties named therein shall be and is hereby made a party.

2. Complainant's application for a temporary injunction is, as to the maximum freight laws of 1907, sustained. Until the further order of court herein, the defendants and each of them are enjoined from doing any act, attempting to recover any penalty, seeking to enforce or having enforced, or asserting any claim or right under or by virtue of either of the maximum freight rate acts of 1907 mentioned in said amended and supplemental bill, to the end that each defendant as to each of said acts of 1907 be restrained as effectually as the defendants were enjoined by the temporary in-
96 junction heretofore issued herein as to and in connection with the act of 1905. By consent of complainant, the injunction bond heretofore filed shall stand as applicable to this order, the same as if it were executed and filed this day.

3. As to the passenger act of 1907, the order heretofore entered upon the court's own motion, shall remain in force until June 19th, 1907, at six o'clock a. m., at which time the rates fixed by said act shall be put and kept in force for three months without prejudice to the rights of either party for the purpose of ascertaining more definitely the extent that experience will show that the rates under said act reduce or increase the earnings of complainant.

The court reserves the power upon the application of any person interested, to hereafter make such further or other order upon this subject as it deems proper.

4. Pending the further hearing and final determination of this case, the complainant shall preserve and keep in existence its waybills for state freight.

(Signed) SMITH McPHERSON, *Judge.*

Said amended and supplemental bill of complaint, filed
97 herein on June 11th, 1907, is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3006.

CHICAGO AND ALTON RAILROAD CO., Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Complainant's Amended and Supplemental Bill.

To the Honorable Judges of the Circuit Court aforesaid:

Your orator, by leave of court, brings this, its amended bill, and thereupon avers:

1. Upon the 16th day of June, 1905, it filed herein against the Defendants in the above entitled case its original bill, (reference to which is now made the same as if copied herein), seeking to enjoin as illegal, unconstitutional and confiscatory the enforcement of the provisions of an act of the legislature of the State of Missouri (herein called the "Act of 1905"), seeking to fix certain maximum freight rates.

2. The said legislature also passed in 1905 an act approved April 14, 1905, in words and figures as follows:

"Corporations, private: Railroad Classification, Charges—Commissioners.

An Act to amend Article IV, Chapter 12, of the Revised Statutes of Missouri of 1899, entitled 'Railroad Classification, Charges, Commissioners,' by adding a new section thereto, to be known as Section 1195*a*.

SECTION 1. Fixing charges for carrying undressed stone, crushed rock and building or paving brick.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. That article IV, Chapter 12, of the Revised Statutes of Missouri of 1899, entitled 'Railroad Classification, Charges, Commissioners,' be, and the same is hereby amended by adding a new section thereto, to be known as Section 1195*a*, to read as follows:

SECTION 1195*a*. No individual, company or corporation
98 owning, operating, managing or leasing any railroad or part of a railroad in this State, shall charge for or receive for carrying a carload of forty thousand pounds of undressed stone, sand or building or paving bricks more than forty cents per ton for the first ten miles, twenty cents per ton for the second ten miles, or more than five cents per ton for each additional ten miles, and any excess in weight shall be charged for at the same rate per ton as for an even carload.

Approved April 14, 1905."

3. Since the filing of said original bill and upon or about January 1, 1907, the office of the said Joseph P. Rice as a railroad and warehoues commissioner expired by limitation of the time for which he was elected and H. R. Oglesby has been duly elected and qualified as his successor, and is now acting as such. It is, therefore, proper that he should be made a party defendant hereto.

4. Each of the railroad companies operating railroads in the State of Missouri at the same time filed in this court original bills to the same purport and for the same purpose, against said members of the Railway and Warehouse Commissioners and the Attorney General and certain shippers upon the line of its road. Such proceedings were had therein that temporary injunctions were issued, the causes were put at issue and duly referred to the Honorable Frank L. Schofield to take certain proofs and make certain findings of fact. The parties agreed that before taking the evidence in all the cases, they would first take that in three of them, temporarily suspending the taking of further testimony in the others. In accordance with said agreement the evidence was taken in the three cases instituted by the Missouri Pacific, Wabash and Chicago, Burlington & Quincy Railway Companies, and the said causes are now ready for submission to the special master upon the original bills so filed, and have been set for argument before him upon June 18, 1907.

5. The Governor of the State, in giving his written reasons for approving the Act of 1905, indicated that it was with some reluctance that he signed same, expressly stating that "the rate on live stock seems unjust." So at the time of submitting his biennial general message to the 43rd General Assembly of the State, he called
99 attention to the litigation aforesaid, and suggested a modification and amendment of the law to meet fatal defects therein. Thereafter, on February 27, 1907, he sent a special written message to the legislature, in which, among other things, he said in reference to the Act of 1905:

"The statute enacted by the last General Assembly is defective in the penalty clause, which applies only to railroads. The penalty should be made to apply to persons, corporations and partnerships. The cattle clause should be corrected in the light of the testimony adduced in the freight litigation so as to fix these rates at an amount that will stand the test of the judicial crucible."

6. Pursuant to this request and the acknowledgment thus made of the invalidity of the existing law, the enforcement of which was sought to be enjoined by the original bill, the legislature passed an act (herein called the Act of 1907) which will take effect on June 14, 1907, in words and figures as follows:

"Corporations, Private: Railroads—Freight Charges.

An Act to repeal an act of the 43rd general assembly, approved April 15, 1905, entitled 'An act to amend Chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled "Corporations, private," by repealing section 1194 of said Revised Statutes, being part of article IV of said chapter, concerning railroad classification, charges, commissioners, and to enact in lieu thereof the following new sections providing for the regulation of freight charges by railroads and the recovery of penalties for the violation thereof,' and to repeal an act of the 43rd General Assembly, approved April 14, 1905, entitled 'An act to amend article IV, chapter 12, of the Revised Statutes of Missouri, 1899, entitled "Railroad classifications, charges, commissioners," by adding a new section thereto, to be known as section 1195*a*, fixing the charges for carrying undressed stone, crushed rock and building or paving brick,' and to enact in lieu thereof certain new sections, to be known as sections 1194, 1194*a*-1, 1194*b*-1 and 1194*c*-1, providing for the regulation of freight charges by railroads and prescribing the punishment for a violation thereof, which new sections shall read as follows:

SECTION 1194. Classification and charges for carrying freight in car load lots.
SECTION 1194*a*. Penalty for violation.
SECTION 1194*b*. Not to relieve railroad from complying with other laws.
SECTION 1194*c*. Repealing conflicting acts.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. That sections 1194, 1194*a* and 1194*b* of the act of the 43rd general assembly, approved April 15, 1905, concerning railroad classification, charges, commissioners, and providing for a penalty for a violation thereof, said sections being enacted in lieu of section 1194, chapter 12 of the Revised Statutes of Missouri, 1899, in "corporations, private," and section 1195*a* of an act of the 43rd general assembly, approved April 14, 1905, concerning railroad classifications, charges, commissioners, fixing charges for carrying undressed stone, crushed rock and building or paving brick, be and the same are hereby repealed, and the following, to be known as sections 1194, 1194*a*-1, 1194*b*-1 and 1194*c*-1 of said Revised Statutes are enacted in lieu thereof.

SECTION 1194. No individual, company or corporation owning, operating, managing or leasing any railroad, or part of railroad, designated in section 1191 as in classes A, B or C, shall demand, charge or receive a greater or higher rate for carrying from initial to terminal points in this state articles named in the several classes and the commodities herein designated than is hereinafter provided for, namely: Class D, in car loads of 40,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first twenty-five miles, and not exceeding one-half cent per hundred pounds for the second twenty-five miles, or fractional part thereof, and not ex-

ceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class E, in car loads of 24,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first twenty-five miles, and not exceeding one-half cent per hundred pounds for the second twenty-five miles or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class F, in car loads of 30,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first twenty-five miles, and not exceeding one-half cent per hundred pounds for the second twenty-five miles or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class G, in car loads of 30,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first twenty-five miles, and not exceeding one-half cent per hundred pounds for the second twenty-five miles or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class H, in car loads, in common cars, measuring inside from 29 feet to and including 30 feet and 6 inches in length (to be known as standard cars), not exceeding $8.00 per car load for the first twenty-five miles, and not exceeding $4.00 per car load for the second twenty-five miles or fractional part thereof, and not exceeding $2.00 per car load for each additional twenty-five miles or fractional part thereof over twelve miles. For the carriage of any of the articles comprising class H, in cars of other lengths for the distances above specified, the following percentages of the foregoing rates per car load shall not be exceeded, namely: In cars of length less than 29 feet, 94 per cent; in cars of length over 30½ feet to and including 32 feet, 104 per cent; in cars of length over 32 feet to and including 33 feet and 9 inches, 107 per cent; in cars of length over 33 feet and 9 inches to and including 36 feet, 110 per cent; in cars of length over 36 feet to and including 38 feet, 113 per cent; in cars of length over 38 feet to and including 40 feet, 116 per cent; in cars of length over 40 feet to and including 42 feet, 125 per cent; in cars of length over 42 feet to and including 44 feet, 135 per cent; in cars of length over 44 feet, 140 per cent of the rates herein specified for cars of the standard length of 29 feet to and including 30 feet and 6 inches shall not be exceeded. All the foregoing lengths to be taken by inside measurements. Class 1, car loads of 20,000 pounds minimum weight not exceeding $14.00 per car load for the first twenty-five miles, and not exceeding $2.00 per car load for the second twenty-five miles, or fractional part thereof, and not exceeding $2.00 per car load for each additional twenty-five miles or fractional part thereof. For a car load of 40,000 pounds of minimum weight undressed stone, crushed rock, sand, railroad ties, cordwood, building or paving brick, not exceeding 40 cents per ton of 2,000 pounds to the ton for
101 the first fifty miles or fractional part thereof, and not exceeding five cents per ton per car load for the next ten miles or fractional part thereof, and not exceeding five cents per ton per car load for each additional ten miles or fractional part thereof. In

computing the rate of freight, according to the provisions of this article, the distance shall be computed from the point where it is received to the point of destination in the state, notwithstanding it may pass from one road to another.

SECTION 1194*a*. Any individual, company or corporation owning, operating, managing or leasing any railroad, or part of railroad, designated in section 1194, or any officer, agent, representative or employee thereof who violate the provisions of section 1194, shall be adjudged guilty of a misdemeanor and, on conviction, shall be punished by a fine of not to exceed $5,000.00: Provided, that the money received from any fine under the provisions of this act shall be paid into the school fund in the county in which the case is prosecuted.

SECTION 1194*b*. This act shall not have the effect of relieving any person, partnership or corporation, owning or operating any railroad in this state from any liability or penalty heretofore incurred for failure to comply with any law of this state.

SECTION 1194*c*. All acts and parts of acts, and all rules and regulations, freight schedules, classifications and groupings by railroad companies, or the railroad and warehouse commissioners of this state, in conflict with the provisions of this act, are hereby repealed and declared void.

Approved March 19, 1907."

By this act an attempt was made to comply with the request of the Governor and to repeal the said Act of 1905, together with that mentioned in paragraph 3 hereof, with the exception that no penalty or liability incurred should be affected by such repeal, the purpose and intention of defendants being to attempt to enforce against your orator all penalties which accrued if the said acts are held to be illegal.

7. In addition thereto, the legislature in 1907 passed certain acts which will take effect upon June 14, 1907, being in words and figures as follows:

"Corporations, Private: Railroads—Freight Charges.

An Act to amend article 4, chapter 12, Revised Statutes of Missouri of 1899, by adding a new section thereto, to be known as section 1195*a*, and relating to freight charges and classifications.

SECTION 1. Fixing freight charges on fruits.
SECTION 2. Inconsistent acts repealed.
SECTION 3. Penalty for violation.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. That article 4, chapter 12, of the Revised Statutes of Missouri, 1899, entitled 'Railroad classification, charges, commissioners,' be and the same is hereby amended by adding a new section thereto, to be known as section 1195*a*, which said section shall read as follows:

SECTION 1195*a*. No individual., company or corporation owning, operating, managing or leasing any railroad or part of rail-
102 road in this state, shall charge for or receive for carrying apples and pears in car loads of 24,00[0] pounds minimum weight, more than six cents per hundred pounds for the first twenty-five miles or fractional part thereof, and not more than one cent per hundred pounds for each additional twenty-five miles or fractional part thereof. For strawberries, peaches, grapes and other berries in car loads of 18,000 pounds minimum weight, not exceeding fifteen cents per hundred pounds for the first twenty-five miles or fractional part thereof, and not exceeding two cents per hundred pounds for each additional twenty-five miles or fractional part thereof.

SEC. 2. All acts and parts of acts and all rules and regulations, freight schedules, classification[s] and grouping[s] by railroad[s] companies, or the railroad and warehouse commissioners of this state, in conflict with the provisions of this act, are hereby repealed and declared void.

SEC. 3. Any individual company or corporation owning, operating, managing or leasing any railroad or part of a railroad in this state, violating the provisions of this act, shall, on conviction, be adjudged guilty of a misdemeanor, and subject to a fine of not to exceed one thousand dollars for each offense.

Approved March 19, 1907."

"Corporations, Private: Railroads.

An Act to provide transportation on railroads for the shippers of freight in this state in carload lots.

SECTION 1. Railroads to issue to certain shippers transportation.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. Whenever any railroad company or corporation doing business within the limits of this state shall receive any live stock to be shipped over the said road or roads by carload lots, said corporation shall, in consideration of the price paid for said carload lots, issue to the shipper, his agent or employee, at the time of making out the contract or bill of lading, a round trip ticket to and from said points designated in said bill of lading, without further expense to said shipper, provided that the points of destination are within this state, and in case said point of destination is without this state, then said railroad corporation shall issue to such shipper, his agent or employee, a round trip ticket to a point within this state nearest to the point without this state to which said shipment of live stock is shipped: Provided, that in case said shipper shall ship more than one car load at any one shipment the said railroad corporation shall not be compelled to give to said shipper more than one round trip ticket with such shipment, which said ticket shall be good on the freight train on which said stock is shipped, and on all trains on said road carrying passengers on the return trip, and shall be good for a period

of ten days, and any railroad company or corporation willfully violating the provisions of this section, or which shall fail, neglect or refuse to furnish and deliver such ticket to such shipper, his agent or employee, shall forfeit and pay, as a penalty, to said shipper, not less than three hundred dollars nor more than five hundred dollars, to be recovered by civil action in any court of competent jurisdiction.

Approved April 4, 1907."

8. All the averments of the original bill apply to the said Act of 1907 and also to each of the acts mentioned in paragraph 7 hereof, except that if for the classes of freight mentioned in the said
103 Acts of 1907 alone, or in all the Acts of 1907, your orator should charge the maximum rate therein authorized and practically capable of being charged, its total gross receipts from state traffic would be reduced in a very large sum, which though differing in items would not be as a whole substantially less than that mentioned in the original bill as to the Act of 1905. Each of said freight Acts of 1907 is violative of the provisions of the constitution to the same extent as was alleged as to the Act of 1905. But the freight Acts of 1907 did not so correct the evils of the former laws as set forth in the original bill, and the rates were thereby fixed at amounts that were unreasonable, and confiscatory, and less than the cost of the service.

9. The Governor in calling for the passage of said Act of 1907, and the legislature in passing the same, did so for the avowed purpose of increasing certain of the maximum rates of the Act of 1905 which they conceived had in this litigation been proved to be unreasonable and confiscatory and could not be enforced. Notwithstanding this, the rates as finally so fixed, considered alone, were not upon such a basis as would return any reasonable or fair compensation to the complainant upon the value of that portion of its property devoted to such use. Even if the laws in existence in 1905 relative to passenger fares, had remained in force, still the freight rates as fixed by the said Acts of 1907 would have been unreasonable and confiscatory, and would not have given any just return upon the value of that portion of your orator's property as a whole devoted to state traffic. However, the legislature of the state, without any fixed or definite knowledge upon the subject of rates, erroneously conceived that if the increase as aforesaid in the freight rates were necessary and were made, there could be a general equalization of rates by a decrease in the passenger rates and so in substance they could legally overcome and offset any advantage from the increase in freight rates by decreasing the maximum rates to be charged for state passenger traffic about thirty-three and one-third
104 per cent, and thus, while defeating pending litigation, the public as a whole would not be the loser. The result was that at the same session, and as part and parcel of one transaction, and substantially as one law, and to accomplish such purpose, there was passed and the Governor approved, an act herein called the "Passenger Act," which, if valid, will take effect on June 14, 1907. The same reads as follows:

"Corporations, Private: Railroads—Passenger Rates.

An Act to repeal sections 1191 and 1192 of chapter 12, article 4, Revised Statutes of Missouri, 1899, entitled 'Railroad classification—charges—commissioners,' by striking out sections 1191 and 1192 and enacting the following new sections in lieu thereof, to be known as sections 1191 and 1192 and 1192*a*.

SECTION 1191. Classification of railroads.
SECTION 1192. Passenger charges regulated.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. That all of sections 1191 and 1192 of chapter 12, article 4 of the Revised Statutes of Missouri, 1899, be and the same are hereby repealed and three new sections be enacted in lieu thereof, to be known as sections 1191 and 1192 and 1192*a*, so that said sections shall read as follows:

SECTION 1191. Roads classified—All railroads in the state of Missouri are hereby divided into four classes, to be known as Class A, class B, class C and class D. Class A shall include all through or trunk line railroads and all branch roads owned, leased, controlled or occupied by such through or trunk line railroad companies or corporations. Class B shall include all other railroads or parts of railroads owned, leased, controlled or occupied, or which may hereafter be owned, leased, controlled or occupied, either wholly or in part, by any trunk line company or corporation. Class C shall include all other railroads of a greater length than forty-five miles. Class D shall include all roads less than forty-five miles in length not owned, leased, controlled or occupied by any trunk line company or corporation.

SECTION 1192. Passenger charges regulated.—Any individual, company or corporation owning, operating, controlling or leasing any railroad or part of a railroad in this state, in the several classifications as herein prescribed, shall be limited to a compensation per mile, for the transportation of any person with ordinary baggage not exceeding one hundred pounds in weight, as follows: In classes A, B and C, not exceeding two cents per mile, and in class D, not exceeding four cents per mile: Provided, that no such individual, company or corporation shall charge, demand or receive any greater compensation per mile for the transportation of children of the age of twelve years or under than one-half of the rate above prescribed; and provided further, that the rates for transportation herein prescribed may be reduced, as hereinafter provided.

SECTION 1192*a*. Any individual, company or corporation, or any agent or officer thereof, who shall violate any of the provisions of section 1192 of this act, shall be deemed guilty of a misdemeanor, and upon conviction, shall pay a fine of not less than one hundred nor more than five hundred dollars.

Approved February 27, 1907."

10. All the averments of the original bill apply to said Passenger Act. It is violative of each constitutional pro-
105 vision mentioned, and subject to each objection made, in the original bill to the Act of 1905, and all the facts there averred as to why the Act of 1905 should be held to be void and action thereunder restrained, are not only true as to the Acts of 1907 but also as to said Passenger Act. If enforced, it will reduce the earnings of your orator from said Passenger business in the practical and ordinary operation of its road, substantially one-third. The state passenger earnings for the year 1906 were in the aggregate substantially $758,615, and yet, if the Passenger Act as aforesaid had been applied thereto, said earnings would have been reduced at least to the sum of $632,977, or an annual loss of $125,638. The property of your orator in the state is used as a whole both for state and interstate freight and passenger business, and, as such, is quite valuable. The value of that portion devoted to the carriage of state business, considered as a whole, or separately as to the passenger business only, is such that in either case the reduction in rates by said Passenger Act would not only fail to make any reasonable return on such valuation, but would cause such business to be done at an actual loss.

11. The said Passenger Act was passed for the avowed purpose of reducing the state passenger rates of your orator so as to offset and overcome a supposed increase of certain of the state freight rates made under the Act of 1907, and the attempt was made to frame each act so as to avoid the injunctive relief in this and in each action heretofore instituted by the other railroad companies operating lines in Missouri. As your orator is informed and believes, the state and defendants now unjustly and improperly claim that since upon the face of these acts provision is only made for general penalties, there is no remedy by injunction; that the original bill can no longer be maintained, and that the state through its officers is en-
106 titled to have enforced the various statutory penalties for each shipment made and each passenger carried at a rate in excess of that fixed by the freight Acts of 1907 and the said Passenger Act, as well as penalties under the abandoned Act of 1905.

As to the said contentions, your orator respectfully submits:

(*a*) Such views, if adopted, would result in a multiplicity of suits, the harassment of your orator, and tedious and expensive litigation, because if an injunction be not herein granted, and said acts be not complied with, many suits and prosecutions will be brought and many fines and penalties imposed and no opportunity will be afforded to your orator to present its claim of the unconstitutionality of said act and the confiscatory nature of the rates fixed. Such an inquiry involves the examination of long and tedious accounts, the study of books and papers and an expert knowledge of the trier of fact, none of which could be properly had in the many trials to be had in a court of law to enforce the penalties. Hence the result would be pending the inquiry, your orator would be required to put in and enforce said rates to its irreparable damage, because it would be compelled, pending the litigation, to carry traffic at the reduced rates

with no practicable way of recovering the difference between the rates now charged and as so reduced.

(*b*) The real purpose of the original bill was to determine whether that portion of the property of your orator devoted to state business could, if the Act of 1907 were enforced, receive such return upon its value as would be fair, reasonable and not confiscatory. Upon the trial of the three cases heard by the special master, such was the theory adopted by both parties, and the proofs were by both of them directed to that end. In view of this situation, it is respectfully submitted that the full determination of all questions of rates in the pending cases can not be defeated or impaired by the repeal by the state legislature of the particular act questioned by the original bill and the passage of another and different act in such form as to prevent any adequate relief from a court of equity and to remit a complainant to a defense in numberless actions of law to recover penalties. But if the rights of the parties should be ascertained by a court of equity, this can be done adequately through the injunctive process, surrounded and controlled by such conditions as may be proper and just in the premises.

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(*c*) It would be unjust and inequitable to permit officers of the state to claim that the validity of an act alleged to be confiscatory in its nature should be determined in a way other than would afford a full and fair hearing, which can only be by the processes of a court of equity. In order that there may be the fullest and fairest hearing of the controversy, your orator consents that any state officer, or any private person or corporation may appear herein and show, if they can, why the rates fixed in the acts aforesaid are lawful, reasonable or enforcible, and that the court may make any reasonable order to protect the public and speed the hearing.

(*d*) Each of the special duties devolving upon the members of the Board of Railroad Commissioners and the Attorney General, as stated in the original bill, applies to the Acts of 1907 and the Passenger Act aforesaid, so that even as an original bill, this proceeding could be maintained.

(*e*) The constitution of the state provides that all penalties such as are attempted to be prescribed for the violation of the acts herein mentioned go to the school-fund of the various counties, and the statutes of the state impose the special duty of collecting the same and preserving and investing the proceeds thereof, upon the county court and the treasurers of the respective counties of the state Joseph M. Patterson, Charles E. Moss and George Dodd are the judges of the county, and Arthur C. Warner is treasurer, and each is a resident and citizen of the county of Jackson, State of Missouri, through which the line of your orator passes, and from and to which there is transported a very large part of the freight and passenger traffic, the maximum rates for carriage of which are fixed by said Acts of 1907, and said Passenger Act. Each of said judges and said treasurer is hereby made a defendant. Each proposes and intends and will, unless restrained herein, seek to enforce and collect the penalties provided for in the said acts. In view of the fact that the line of your orator's road is not confined to one

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county, it is inconvenient, impracticable, expensive, and hence, unnecessary to make the county judges and the treasurer of each county parties hereto, but such as are named can be, and are sued as a class so that others similarly situated may, if they desire, appear herein and be heard upon their own behalf or through those now made parties, or, if necessary, be brought in by process of court and required to make defense.

(*f*) Lee Dunlap and Fred C. Wifer are citizens and residents of Jackson county, Missouri, who constantly travel over your orator's road, who have demanded and supported the passage of the Passenger Act aforesaid, and threaten to and will seek to enforce its provisions unless the rates therein fixed are established and put in force. They are hereby made defendants, and they represent a class of passengers and travelers so numerous that it is impracticable to join them all, and those named are made defendants herein for the purpose of determining, as against your orator, the rights of the entire traveling public under the said Passenger Act.

12. The rates fixed by each the said Acts of 1907 and said Passenger Act and as a whole are so unreasonable and confiscatory that a compliance therewith will force an unreasonable reduction and confiscation of your orator's entire revenue contrary to the provisions of the fourteenth amendment to the constitution of the United
109 States and provisions of the constitution as mentioned in the original bill. Besides this, to enforce the rates so fixed in any of said acts would necessarily affect the interstate rates upon the same commodities. Owing to the peculiar geographical location of the state of Missouri, the state rates necessarily affect all interstate rates upon the same commodities and travel and this results as a practical and unavoidable matter in the conduct of business affairs, the location of markets, business houses, the extent of territorial distribution from the various cities in the state and the necessities of travel. In addition to this some of the chief lines of railroad in Missouri, in running to and from points therein, pass out of the state so as to make any transportation betwen such points interstate commerce. Hence when a state rate between such points on lines wholly within the state is fixed lower than the interstate rate the companies whose transportation is interstate must meet that rate or carry none of the traffic. Such traffic constitutes a very substantial portion of the entire state traffic. Congress has attempted to legislate upon the subject of interstate rates, and since, as a matter of fact, none of said state rates can be enforced without affecting interstate rates, all of the said legislative acts are unconstitutional and void and of no effect and violative of section 8, article 1 of the Constitution of the United States.

In consideration whereof, and forasmuch as your orator is remediless in the premises and by the strict rules of the common law can only have relief in a court of equity where matters of this kind are properly cognizable and relievable, your orator prays that: (1) Each of the said Acts of the Legislature of Missouri of 1907, herein set forth, including said Passenger Act, be declared unconstitutional, unenforcible and not binding upon your orator. (2) All the relief

asked in the original bill as to the Act of 1905 be granted as to the said Acts of 1907. (3) The temporary injunction heretofore issued herein be extended against the defendants to the original and
109½ to this bill so as to cover and include any claim or right under or by virtue of any of said freight Acts of 1907 and said Passenger Act and be made permanent. (4) Your orator have such other and further relief as is just and equitable.

And may it please your Honor to grant unto your orator a writ of subpœna of the United States, issuing out of and under the seal of this honorable court, directed to each of the said defendants, including each of those hereby and herein made a party defendant, commanding them and each of them on a day certain therein to be named and under a certain penalty, to be and appear before this honorable court then and there to answer, but not under oath, an answer under oath being expressly waived, all and singular the premises and to stand to, perform and abide by such order, direction and decree as may be made against them in the premises.

And your orator will ever pray, etc.

WINSTON, PAYNE, STRAUN & SHAW,
SCARRITT, SCARRITT & JONES,
Solicitors for Complainant.

FRANK HAGERMAN,
Of Counsel.

STATE OF ILLINOIS,
County of Cook, ss:

I, Geo. J. Charlton, upon oath, say that I am General Passenger Agent, of complainant in above entitled bill, and as such am familiar with the traffic operations of said company, and all the matters and things mentioned in the said bill which I have read. I know the contents thereof and same are true of my own knowledge, except as to those matters therein stated upon information and belief, and as to those matters, I believe them to be true.

GEO. J. CHARLTON.

Subscribed and sworn to before me this 11th day of June, 1907. My commission expires March 21st, 1911.

[SEAL.] HARRY K. McEVOY,
Notary Public.

Thereupon, to-wit, on the 25th day of June, 1907, a Writ of subpœna was issued.

110 Afterwards, to-wit, on the 15th day of July, 1907, the following order was filed and entered of record, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3006.

CHICAGO & ALTON RAILROAD COMPANY, Complainant,
vs.
HEBRERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Order.

This cause coming on for hearing this July 15th, 1907, leave is hereby given to complainant to file an Amendment to Complainant's Bill of Complaint. The application for a temporary injunction against Herbert S. Hadley, Attorney General of the State of Missouri, from prosecuting the suit in the state court which he has instituted against the complainant is continued until the expiration of the ninety days' test heretofore ordered, unless the court should hereafter set the same down for hearing at an earlier date.

(Signed) SMITH McPHERSON, *Judge.*

111 Afterwards, to-wit, on the 16th day of July, 1907, an acknowledgment of service of subpœna was filed. Said acknowledgement is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3006.

CHICAGO & ALTON RAILROAD COMPANY, Complainant,
vs.
HEBRERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Acknowledgment of Service of Subpœna.

Service of the subpœna issued herein upon June 25, 1907, is acknowledged with the same force and effect and no more than if served by the proper officer.

HERBERT S. HADLEY,
Attorney General,
Solicitor for Railroad Commissioners, Including H. R. Oglesby, Herbert S. Hadley, Attorney General, and Wm. A. Kemper, and Alexander McKenzie.

112 Afterwards, to-wit, on the 16th day of July, 1907, an acknowledgment of service of subpœna was filed. Said acknowledgment is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3006.

CHICAGO & ALTON RAILROAD COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Acknowledgement of Service of Subpœna.

Service of the subpœna issued herein upon June 25, 1907, is acknowledged with the same force and effect and no more than if served by the proper officer.

LEE DUNLAP.
FRED C. URFER.

113 Afterwards, to-wit, on the 20th day of July, 1907, an Amendment to Complainant's Bill of Complaint was filed. Said amendment is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3006.

CHICAGO & ALTON RAILROAD COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Amendment to Complainant's Bill of Complaint.

The complainant, by leave of court, presents this its amendment to the bills heretofore filed herein, and respectfully shows to the court that it desires to, and does hereby present the matters and things hereinafter set forth, as paragraphs 13, 14, 15, 16, 17, 18, 19, 20 and 21, of the amended and supplemental bill heretofore filed herein, to be inserted therein immediately following paragraph 12 and preceding the prayer thereof. Thereupon complainant avers:

13. It hereby refers to the original and to the amended and supplemental bills herein, with the same force and effect as if copied herein.

14. Conceiving, and the defendants insisting, that an additional amended and supplemental bill should only be filed after notice, and upon order of court, and there being no judge of the court within the district at the time, the complainant filed herein, on June 11th, 1907, its written application for leave to file an amended

and supplemental bill, reference to which application is made
114 the same as if copied herein. On the same day, there was served upon counsel for defendants in the original bill, and accepted by them, a written notice, together with a copy of the form of the said amended and supplemental bill, which notice recited that the application to file same, and for a temporary injunction would be presented to the court upon June 14, 1907, at the opening of the court at ten o'clock a. m. Said notice, the acceptance and evidence of service thereof, and form of bill, are upon file and are hereby referred to with the same force and effect as if set out herein. On June 13, 1907, at ten o'clock a. m., there then being a judge of the court within this district, and court being open, complainant presented and asked, pending a hearing of the application to file its amended and supplemental bill the general form of which was then submitted to the court, the right to temporarily file same, and for a restraining order, whereupon the court made an order entered herein upon June 13, 1907, of its own motion in the interests of the public and of all parties, maintaining the status quo pending the hearing, and restraining complainant from putting in force the maximum freight and passenger rates provided by the legislative acts of 1907 mentioned in said bill, and from complying with said acts, reference to said order is now made as fully as if copied herein.

15. Afterwards, on June 14, 1907, Herbert S. Hadley, Attorney General of the State of Missouri, and one of the defendants herein, by his counsel, in flagrant disregard and contempt of the jurisdiction of this court, filed in the circuit court of Kansas City, Missouri, his two petitions in equity in the name of the state at his relation as Attorney General, against this complainant, one asking that the court by mandatory injunction require complainant to put in force the maximum freight rates provided by the said legislative acts of 1907 mentioned in the amended and supplemental bill, and to comply with said acts, and the other as asking the same relief as to the rates fixed by the Passenger Act of 1907. And at his so-
115 licitation, the judge of said court did, in each of said cases, the same day, without notice, issue its restraining order returnable upon the 18th day of June, 1907, requiring the forthwith doing of such acts by this complainant.

Complainant asks leave to produce upon the hearing of this petition, certified copies of said proceedings in the state court, and refer to them as fully as if copied herein.

16. Thereafter at the time fixed in said notice, and upon June 14, 1907, at ten o'clock a. m., there was presented to this court the applications of complainant for leave to file said amended and supplemental bill and for a temporary injunction, and defendants asked a continuance of the hearing for one day, which the court granted, and upon its own motion ordered that said amended and supplemental bill should be deposited with the clerk (which was then and there done), that in the interest of the public and all parties the status quo should be maintained, and that complainant in the meantime and until the further order of court should be restrained from putting in force the maximum freight and passenger

rates fixed by the legislative acts of 1907 mentioned in the said bill, and from complying with said acts. A reference to the said order is now made with the same force and effect as if copied herein. In the meantime the said restraining orders from the state court were served upon complainant. Thereafter, upon June 15, 1907, the said applications were by the counsel for the respective parties and by this court, taken under advisement.

17. Thereafter upon June 17, 1907, this court made and entered an order which, omitting title, is in words and figures as follows:

Order.

"This cause came on for hearing this 17th day of June, 1907, the parties appearing by their counsel in response to notice, and the court being fully advised in the premises, orders and adjudges:

1. Complainant's motion for leave to file an amended and supplemental bill is sustained and such leave is given, the same to be filed as of June 11th, 1907.

Upon such filing process shall be issued so that if the court
116 hereafter decides that the ends of justice require, and the rules of equity permit, the said bill may be treated as an amended, supplemental, ancillary, dependent or original bill.

To said bill, each of the parties named therein shall be and is hereby made a party.

2. Complainant's application for a temporary injunction is, as to the maximum freight laws of 1907, sustained. Until the further order of the court herein, the defendants and each of them are enjoined from doing any act, attempting to recover any penalty, seeking to enforce or having enforced, or asserting any claim or right under or by virtue of either of the maximum freight rate acts of 1907 mentioned in said amended and supplemental bill, to the end that each defendant as to each of said acts of 1907 be restrained as effectually as the defendants were enjoined by the temporary injunction heretofore issued as to and in connection with the act of 1905. By consent of the complainant, the injunction bond heretofore filed shall stand as applicable to this order, the same as if it were executed and filed this day.

3. As to the passenger act of 1907, the order heretofore entered upon the court's own motion shall remain in force until June 19th, 1907, at 6 o'clock a. m., at which time the rates fixed by said act shall be put and kept in force for three months without prejudice to the rights of either party for the purpose of ascertaining more definitely the extent that experience will show that the rates under said act reduce or increase the earnings of complainant.

The court reserves the power, upon the application of any person interested, to hereafter make such further or other order upon this subject as it deems proper.

4. Pending the further hearing and final determination of this case, the complainant shall preserve and keep in existence its waybills for state freight.

SMITH McPHERSON, *Judge.*"

Accordingly said bills were forthwith marked filed as of June 11, 1907, as in and by said order provided. Subpœnas have been duly issued as in and by said order provided, and served upon most of the defendants, and as to the others are in the marshal's hands for service and not yet returned, and complainant is not yet advised as to whether actual personal service has been had.

18. Thereafter upon June 18, 1907, the circuit court of Jackson County, Missouri, upon the application of the said Attorney General entered an order dismissing the case mentioned in paragraph 15 hereof which was filed against this complainant for a mandatory injunction to require it to put in force the maximum freight rates provided by the said legislative acts of 1907, and upon the same day the same court, upon the application of the said Attorney General, entered an order setting aside the restraining order issued in the case mentioned in the same paragraph to require it to put in force
117 the maximum passenger rates fixed by the legislative act of 1907 aforesaid, but did not dismiss the case, the Attorney General insisting that it should remain pending. He now threatens to and he will, unless enjoined herein, proceed with the trial and prosecution of the same on and after September 20, 1907, at the expiration of the ninety day test mentioned in the order hereinbefore set out.

19. The said state court has no jurisdiction in the premises and has no right or power to compel complainant by injunction to put in force the maximum passenger rates aforesaid, and any attempt so to do would deny to complainant the protection accorded to it by the fourteenth amendment to the Constitution of the United States, which it now claims. Such attempt to oust this court of its jurisdiction, is in contempt thereof, and as to it was and is futile.

20. With the exception hereinafter stated, the facts alleged herein in paragraphs 13 to 18, inclusive, are true as to each of the following railway companies in the state of Missouri: St. Louis & San Francisco; Atchison, Topeka & Santa Fe; St. Louis Southwestern; Chicago, Rock Island & Pacific; St. Louis, Kansas City & Colorado; Kansas City Southern; St. Louis & Hannibal; Missouri Pacific; St. Louis Iron Mountain & Southern; Missouri, Kansas & Texas; Chicago, Burlington & Quincy; Quincy, Omaha & Kansas City; Wabash; St. Joseph & Grand Island; Kansas City, Clinton & Springfield; Chicago Great Western; Chicago, Milwaukee & St. Paul, and Chicago & Alton. Each of said companies had at the same time filed in this court bills similar in nature to the original bill herein to enjoin the enforcement of the Acts of 1905, in which temporary injunctions had been issued and which cases are still pending and undetermined. Said exception is that the cases in the state court mentioned in paragraph 15 hereof against the St. Louis & San Francisco Railroad Company; St. Louis Southwestern Railway Company; St. Louis, Kansas City & Colorado Railway Company; St. Louis & Hannibal Railway Company; Missouri Pacific Railway Company; St. Louis Iron Mountain & Southern Railway
118 Company; Missouri, Kansas & Texas Railway Company and the Wabash Railroad Company, were filed in the circuit court

of St. Louis, Missouri, while those against the other companies were filed in the circuit court of Jackson County, Missouri, at Kansas City. With this exception, similar action to that herein averred was taken in each case pending in this court, and the Attorney General threatens to and unless restrained will, proceed to prosecute each of said cases in the state courts as hereinbefore alleged. As to several of said complainants, the restraining orders from the state courts were served while the parties were presenting said applications upon June 14.

21. The passenger act of 1907 and each freight act of 1907, is void and of no effect for that it is an attempt to deprive complainant of its property without due process of law, and denies to complainant the equal protection of the law for reasons additional to those heretofore given, in that:

(*a*) Harsh and unreasonable penalties are provided with no provision for a test of the validity of the act, except at the risk of incurring such penalties which, if applied to each shipment of state freight or each passenger traveling on a state journey, over complainant's line, would within two years be greater than the value of complainant's whole property devoted to such use.

(*b*) It directly influences, affects and bears upon interstate freight and passenger traffic and fixes and regulates the same, for these reasons additional to those heretofore given:

(1) Many of the companies operate lines between the large cities of the state, some of which are wholly within the state and some of which go out of the state into Kansas and then back into this state. For illustration: The Kansas City, Clinton & Springfield Railway Company and the St. Louis & San Francisco Railroad Company are trunk lines between Kansas City, Missouri, and Springfield, Missouri, of substantially the same length; the line of the former
119 between those points extending into and out of Kansas, so that all its carriage between said points is interstate; the other company has one line which in said course runs into and out of a portion of Kansas, and another separate line between said points which extends wholly through Missouri so that the carriage between said points upon one line is interstate and upon the other, state. Between Joplin and Kansas City there are three trunk lines of substantially the same length, that of the Missouri Pacific Railway Company between said points being wholly within the state and therefore all of its traffic is state, while the lines of the Kansas City Southern Railway Company and the St. Louis & San Francisco Railroad Company between said points extend into and out of Kansas, so that all the traffic between said points is interstate. Between St. Louis, Missouri, and St. Joseph, Missouri, there are two trunk lines, one of which is that of the Chicago, Burlington & Quincy Railway Company, which does not pass out of the state, so that the traffic between said points upon that line is wholly state, the other line is that of the Missouri Pacific Railway Company which in its course passes into and out of Kansas, so that the entire traffic between said points is interstate. Between Kansas City, Missouri, and St. Joseph, Missouri, there are four trunk lines of substantially

equal length, those of the Chicago, Burlington & Quincy Railway Company and the St. Joseph & Grand Island Railway Company are wholly within Missouri and all their traffic between said points is state; the lines of the Missouri Pacific Railway Company and of the Chicago Great Western Railway Company pass into and out of Kansas, so that the entire traffic thereon between said points is wholly interstate.

The said five cities are the largest in the state, their populations, according to the census of 1900 being, St. Louis 575,238; Kansas City, 163,752; St. Joseph, 102,979; Joplin, 26,023; Springfield, 23,267.

The traffic between said cities upon said lines is a very
120 substantial part of the traffic of said lines and of the state; the rates between the points as aforesaid, both for passenger and freight, upon those lines which are interstate, have been for years fixed at a reasonable sum which is much higher than the rates fixed by any of the acts of the legislature in question. If any of the rates mentioned in said acts be put in force between said points upon lines wholly within the state, each of the companies operating the lines which are interstate will necessarily be compelled to lower their rates to the same figure or else, as a matter of fact, none of the traffic between said points will be carried over its line.

(3) The large cities and populous communities of the state are upon its eastern and western borders; the main course of traffic through the state is east and west; all the railroads in the state either operate lines extending into other states, or into the state of Kansas adjoining Missouri upon the west, and Illinois adjoining it upon the east, or else have joint freight and passenger traffic arrangements with lines running into those states for interstate through carriage both of freight and passengers.

So far, pending the test of the passenger rate ordered by this court, it has been demonstrated and is the fact, that the interstate passenger rates are much higher than those fixed by the passenger act of 1907, so that passengers starting from points in Missouri to go to other states buy tickets at two cents a mile to the last station in Missouri upon its border, and then buy tickets or pay fare from thence to their interstate destination, and vice versa from points of interstate trip into Missouri. For illustration a concrete case may be stated. From St. Louis to Kansas City is about 275 miles, thence to Topeka, Kansas, 67 miles, or a total of about 342 miles. The fair and reasonable interstate rate is and has for years been $9.50. A passenger starting from St. Louis may and does, buy his ticket to Kansas City, 275 miles at two cents a mile, or $5.50; he then buys his ticket to Topeka, 67 miles, at three cents a mile or $2.00, making
a total from St. Louis to Topeka of $7.50, thus saving to him-
121 self and losing to the carrier the difference between $9.50 and $7.50, or $2.00. This illustrates the situation upon other lines in the state, so that as a matter of fact it is true that in a state located as the state of Missouri is, the lowering of the rate upon the state traffic below that of the interstate necessarily affects, fixes and lowers the interstate rate in the manner herein stated. The same

thing is true of the freight traffic (though not in this respect in as pointed a degree), because the same practice can, is and will be adopted as to freight.

Wherefore, complainant prays, as heretofore prayed, and asks that the defendants be required to also answer this amendment, but an answer under oath is waived, and in addition to the relief heretofore asked, complainant asks that Herbert S. Hadley, Attorney General of the State of Missouri, be temporarily and permanently enjoined from prosecuting the said suit in the state court which he has instituted against the complainant.

And your orator will ever pray, etc.

E. L. SCARRITT,
W. C. SCARRITT,
E. H. JONES,
Solicitors for Complainant.

FRANK HAGERMAN,
Of Counsel.

STATE OF ILLINOIS,
County of Cook, ss:

I, *Garrard B. Winston* upon oath say that I am General Passenger Agent of complainant in the above entitled cause, and as such am familiar with the traffic questions of said company, and all the matters and things mentioned in said amendment which I have read; I know the contents thereof and the same are true of my own knowledge, except as to those stated upon information and belief, and as to those matters, I believe them to be true.

GEO. J. CHARLTON.

Subscribed and sworn to before me this 17th day of July, 1907. My commission expires Jan. 10, 1909.

[SEAL] GARRARD B. WINSTON,
Notary Public.

122 Afterwards, to-wit, on the 31st day of July 1907, an Acknowledgment of Service of Subpœna was filed. Said Acknowledgment is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3006.

CHICAGO & ALTON RAILROAD COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Acknowledgment of Service of Subpœna.

Service of the subpœna issued herein upon June 25, 1907, is acknowledged with the same force and effect and no more than if served by the proper officer.

CHARLES W. GERMAN,
County Counselor,
Solicitors for Joseph M. Patterson, Charles E. Moss and George Dodd, County Judges of Jackson County, Mo., and Arthur C. Warner, County Treasurer of Jackson Co., Mo.

123 Afterwards, to-wit, on the 2nd day of August, 1907, the demurrer of John A. Knott, et al., Railroad Commissioners, was filed. Said demurrer is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3006.

THE CHICAGO AND ALTON RAILWAY COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

The Joint Demurrers of the Above-named Defendants, John A. Knott, Frank Wightman, and H. R. Oglesby, Railroad Commissioners of the State of Missouri, to the Amended and Supplemental Bill of Complaint as Amended.

First. These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's amended and supplemental bill of complaint as amended to be true in manner and form as the same are therein and thereby set forth and alleged, doth demur thereto and for cause of demurrer show:

1. That the said complainant has not, in and by said amended and supplemental bill of complaint, as amended, made or stated any such

cause as ought to entitle it to the relief thereby sought and prayed for, from or against these defendants, or to any relief whatsoever.

2. It appears upon the face of complainant's amended and supplemental bill of complaint as amended that the complainant has an adequate remedy at law.

3. The matters and things set forth in complainant's amended and supplemental bill of complaint, as amended, are not nor are any of them germane to or supplementary of the original bill in this case.

124 4. If the matters and things set forth in complainant's amended and supplemental bill of complaint, as amended, entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action, not connected with or dependent upon the cause of action set forth in the original bill.

Second. These defendants further demur to the fifth, sixth, seventh and eighth paragraphs of the complainant's amended and supplemental bill of complaint, as amended, because (*a*) the same are not germane to or supplementary of the original bill herein; (*b*) if the matters and things set forth in said paragraphs entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action not connected with or dependent upon the cause of action set forth in the original bill; (*c*) the matters and things set forth in said paragraphs do not entitle complainant to the relief prayed for, or to any relief whatsoever.

Third. These defendants further demur to the ninth and tenth paragraphs of the complainant's amended and supplemental bill of complaint, as amended, because (*a*) the matters and things set forth in said paragraphs are not germane to or supplementary of the original bill herein; (*b*) if the matters and things set forth in said paragraphs entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action not connected with or dependent upon the cause of action set forth in the original bill; (*c*) the matters and things set forth in said paragraphs do not entitle the complainant to the relief prayed for, or to any relief whatsoever.

Fourth. These defendants further demur to the eleventh and twelfth paragraphs of the complainant's amended and supplemental bill of complaint, as amended, because (*a*) the matters and things set forth in said paragraphs are not germane to or supplementary of the original bill herein; (*b*) if the matters and things set

125 forth in said paragraphs entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action, not connected with or dependent upon the cause of action set forth in the original bill; (*c*) the matters and things set forth in said paragraphs do not entitle the complainant to the relief prayed for, or to any relief whatsoever.

Fifth. These defendants further demur to the fourteenth, fifteenth, sixteenth, seventeenth, eighteenth and nineteenth paragraphs of the complainant's amended and supplemental bill of complaint, as amended, because (*a*) the matters and things set forth in said paragraphs are not germane to or supplementary of the original bill

herein; (*b*) if the matters and things set forth in said paragraphs entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action, not connected with or dependent upon the cause of action set forth in the original bill; (*c*) the matters and things set forth in said paragraphs do not entitle the complainant to the relief prayed for or to any relief whatever; (*d*) it appears from said paragraphs that the State Circuit Court of Kansas City, Missouri, has jurisdiction of the suit against the complainant pending therein and mentioned in said paragraphs; (*e*) the State of Missouri had a lawful right to institute said suit in said State court, and said State court had a lawful right to entertain jurisdiction of the same; (*f*) the said Attorney General had a lawful right and the authority to institute the suit referred to in said paragraphs against the complainant, in the State Circuit Court at Kansas City, Missouri, and he has the lawful right and authority to proceed with and prosecute the same to a conclusion; (*g*) if the complainant is aggrieved by the suit against it in the State Circuit Court mentioned in said paragraphs, it has an adequate remedy by making its defense (if any it have) to the same, in said State court.

Sixth. These defendants further demur to the twentieth paragraph of complainant's amended and supplemental bill of complaint, as amended, because (*a*) the matters and things set forth in
126 said paragraph are not germane to or supplementary of the original bill herein; (*b*) if the matters and things set forth in said paragraph entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action, not connected with or dependent upon the cause of action set forth in the original bill; (*c*) the matters and things set forth in said paragraph do not entitle the complainant to the relief prayed for or to any relief whatsoever; (*d*) it appears from said paragraph that the Circuit Court of Jackson County, Missouri, and the Circuit Court at St. Louis, Missouri, have jurisdiction, respectively, of the suits against the complainant and other railway companies mentioned in said paragraph; (*e*) the State of Missouri had a lawful right to institute the suits mentioned in said paragraph, and said State courts had a lawful right to entertain jurisdiction of the same; (*f*) the said Attorney General had a lawful right and the authority to institute in said State Circuit Courts the suits against the complainant and the other railway companies mentioned in said twentieth paragraph, and he has the lawful right and authority to proceed with and prosecute the same to a conclusion; (*g*) if the complainant or any of said other railway companies are aggrieved by the suits in said State Circuit Courts mentioned in said twentieth paragraph, they have an adequate remedy by making their defense (if any they have) to the same, in said State courts.

Seventh. These defendants further demur to the twenty-first paragraph of complainant's amended and supplemental bill of complaint, as amended, because (*a*) the matters and things set forth in said paragraph are not germane to or supplementary of the original bill herein; (*b*) if the matters and things set forth in said paragraph entitle the complainant to any relief whatsoever, they constitute a

new, original and independent cause of action, not connected with or dependent upon the cause of action set forth in the original bill; (*c*) the matters and things set forth in said paragraph do not entitle the complainant to the relief prayed for or to any relief whatever.

Wherefore, and for divers other good causes of demurrer
127 appearing in complainant's amended and supplemental bill of complaint, as amended, and in the paragraphs thereof specifically mentioned in the foregoing demurrers, numbered second, third, fourth, fifth, sixth and seventh, respectively, these defendants demur thereto and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to said amended and supplemental bill of complaint as amended, or to the said paragraphs hereinbefore specifically mentioned, or any of them, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
FREDERICK W. LEHMANN,
SANFORD B. LADD,
Solicitors for Defendants.

FREDERICK W. LEHMANN,
SANFORD B. LADD,
Of Counsel.

I hereby certify that the foregoing demurrers are, in my opinion, well founded in point of law.

SANFORD B. LADD,
Of Counsel for Defendants.

The affidavit required by Equity Rule 31 is hereby expressly waived.

FRANK HAGERMAN,
Counsel for Complainant.

128 Afterwards, to-wit, on the 2nd day of August, 1907, the Demurrer of Herbert S. Hadley, Attorney General, was filed Said Demurrer is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3006.

THE CHICAGO AND ALTON RAILWAY COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

The Demurrers of the Above-named Defendant, Herbert S. Hadley, Attorney General, to the Amended and Supplemental Bill of Complaint as Amended.

First. This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's amended and supplemental bill of complaint as amended to be true in manner and form as the same are therein and thereby set forth and alleged, doth demur thereto and for cause of demurrer showeth:

1. That the said complainant has not, in and by said amended and supplemental bill of complaint, as amended, made or stated any such cause as doth or ought to entitle it to the relief thereby sought and prayed for, from or against this defendant, or to any relief whatsoever.

2. It appears upon the face of complainant's amended and supplemental bill of complaint as amended that the complainant has an adequate remedy at law.

3. The matters and things set forth in complainant's amended and supplemental bill of complaint, as amended, are not nor are any of them germane to or supplementary of the original bill in this case.

129 4. If the matters and things set forth in complainant's amended and supplemental bill of complaint, as amended, entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action, not connected with or dependent upon the cause of action set forth in the original bill.

Second. This defendant further demurs to the fifth, sixth, seventh and eighth paragraphs of the complainant's amended and supplemental bill of complaint, as amended, because (*a*) the same are not germane to or supplementary of the original bill herein; (*b*) if the matters and things set forth in said paragraphs entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action not connected with or dependent upon the cause of action set forth in the original bill; (*c*) the matters and things set forth in said paragraphs do not entitle complainant to the relief prayed for, or to any relief whatsoever.

Third. This defendant further demurs to the ninth and tenth paragraphs of the complainant's amended and supplemental bill of complaint, as amended, because (*a*) the matters and things set forth in said paragraphs are not germane to or supplementary of

the original bill herein; (*b*) if the matters and things set forth in said paragraphs entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action not connected with or dependent upon the cause of action set forth in the original bill; (*c*) the matters and things set forth in said paragraphs do not entitle the complainant to the relief prayed for, or to any relief whatsoever.

Fourth. This defendant further demurs to the eleventh and twelfth paragraphs of the complainant's amended and supplemental bill of complaint, as amended, because (*a*) the matters and things set forth in said paragraphs are not germane to or supplementary of the original bill herein; (*b*) if the matters and things
130 set forth in said paragraphs entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action, not connected with or dependent upon the cause of action set forth in the original bill; (*c*) the matters and things set forth in said paragraphs do not entitle the complain-t to the relief prayed for, or to any relief whatsoever.

Fifth. This defendant further demurs to the fourteenth, fifteenth, sixteenth, seventeenth, eighteenth and nineteenth paragraphs of the complainant's amended and supplemental bill of complaint, as amended, because (*a*) the matters and things set forth in said paragraphs are not germane to or supplementary of the original bill herein; (*b*) if the matters and things set forth in said paragraphs entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action, not connected with or dependent upon the cause of action set forth in the original bill; (*c*) the matters and things set forth in said paragraphs do not entitle the complainant to the relief prayed for or to any relief whatever; (*d*) it appears from said paragraphs that the State Circuit Court of Kansas City, Missouri, has jurisdiction of the suit against the complainant pending therein and mentioned in said paragraphs; (*e*) the State of Missouri had a lawful right to institute said suit in said State court, and said State court had a lawful right to entertain jurisdiction of the same; (*f*) the said Attorney General had a lawful right and the authority to institute the suit referred to in said paragraphs against the complainant, in the State Circuit Court at Kansas City, Missouri, and he has the lawful right and authority to proceed with and prosecute the same to a conclusion; (*g*) if the complainant is aggrieved by the suit against it in the State Circuit Court mentioned in said paragraphs, it has an adequate remedy by making its defense (if any it have) to the same, in said State court.

Sixth. This defendant further demurs to the twentieth paragraph of complainant's amended and supplemental bill of complaint, as amended, because (*a*) the matters and things set forth
131 said paragraph are not germane to or supplementary of the original bill herein; (*b*) if the matters and things set forth in said paragraph entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action, not connected with or dependent upon the cause of action set forth in the original bill; (*c*) the matters and things set forth in said para-

graph do not entitle the complainant to the relief prayed for or to any relief whatsoever; (*d*) it appears from said paragraph that the Circuit Court of Jackson County, Missouri, and the Circuit Court at St. Louis, Missouri, have jurisdiction, respectively, of the suits against the complainant and other railway companies mentioned in said paragraph; (*e*) the State of Missouri had a lawful right to institute the suits mentioned in said paragraph, and said State courts had a lawful right to entertain jurisdiction of the same; (*f*) the said Attorney General had a lawful right and the authority to institute in said State Circuit Courts the suits against the complainant and the other railway companies mentioned in said twentieth paragraph, and he has the lawful right and authority to proceed with and prosecute the same to a conclusion; (*g*) if the complainant or any of said other railway companies are aggrieved by the suits in said State Circuit Courts mentioned in said twentieth paragraph, they have an adequate remedy by making their defense (if any they have) to the same, in said State courts.

Seventh. This defendant further demurs to the twenty-first paragraph of complainant's amended and supplemental bill of complaint, as amended, because (*a*) the matters and things set forth in said paragraph are not germane to or supplementary of the original bill herein; (*b*) if the matters and things set forth in said paragraph entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action, not connected with or dependent upon the cause of action set forth in the original bill; (*c*) the matters and things set forth in said paragraph do not entitle the complainant to the relief prayed for or to any relief whatever.

Wherefore, and for divers other good causes of demurrer
132 appearing in complainant's amended and supplemental bill of complaint, as amended, and in the paragraphs thereof specifically mentioned in the foregoing demurrers, numbered second, third, fourth, fifth, sixth and seventh, respectively, this defendant demurs thereto and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer to said amended and supplemental bill of complaint as amended, or to the said paragraphs hereinbefore specifically mentioned, or any of them, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
FREDERICK W. LEHMANN,
SANFORD B. LADD,
Solicitors for Defendant.

FREDERICK W. LEHMANN,
SANFORD B. LADD,
Of Counsel.

I hereby certify that the foregoing demurrers are, in my opinion, well founded in point of law.

SANFORD B. LADD,
Of Counsel for Defendant.

The affidavit required by Equity Rule 31 is hereby expressly waived.

FRANK HAGERMAN,
Counsel for Complainant.

133 Afterwards, to-wit, on the 2nd day of August, 1907, the Demurrer of J. M. Patterson, et al., Defendants, was filed. Said Demurrer is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3006.

THE CHICAGO AND ALTON RAILWAY COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

The Joint and Several Demurrer of Joseph M. Patterson, Charles E. Moss and George Dodd, Judges of the County Court of Jackson County, Missouri, and Arthur C. Warner, Treasurer of said County, Four of the Defendants Herein, to Complainant's Original Bill of Complaint, Its Amended and Supplemental Bill, and the Amendment to said Bill of Complaint.

These defendants, by protestation, not confessing all or any of the matters and things in complainant's original bill of complaint, its amended and supplemental bill, and the amendment to said bill of complaint to be true in such manner and form as the same are therein set forth and alleged, demur thereto, and for cause of demurrer show that the said complainant has not in and by said original bill of complaint, its amended and supplemental bill, and the amendment to said bill of complaint, made or stated any such cause as doth or ought to entitle it to the relief thereby sought and prayed for from or against these defendants or either of them.

134 Wherefore, and for divers other good causes of demurrer appearing in said original bill of complaint, the said amended and supplemental bill, and the said amendment to the bill of complaint, these defendants respectively demur thereto and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to the said original bill of complaint, the said amended and supplemental bill, and the amendment to the bill of complaint, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
FREDERICK W. LEHMANN,
SANFORD B. LADD,
Solicitors for Defendants.

FREDERICK W. LEHMANN,
SANFORD B. LADD,
Of Counsel.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

SANFORD B. LADD,
Of Counsel for Defendants.

The affidavit required by Equity Rule 31 is hereby expressly waived.

FRANK HAGERMAN,
Counsel for Complainant.

135 Afterwards, to-wit, on the 2nd day of August, 1907, the Demurrer of Wm. T. Kemper and Alexander McKenzie was filed. Said demurrer is in words and figures as follows, to-wit:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3006.

THE CHICAGO AND ALTON RAILWAY COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

The Joint and Several Demurrer of William T. Kemper and Alexander McKenzie, two of the Defendants herein, to Complainant's Amended and Supplemental Bill of Complaint as amended.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's amended and supplemental bill of complaint as amended, to be true in manner and form as the same are therein and thereby set forth and alleged, do demur thereto and for cause of demurrer show:

First. That the said complainant has not, in and by said amended and supplemental bill of complaint, as amended, made or stated any such cause as ought to entitle it to the relief thereby sought and prayed for from or against these defendants, or to any relief whatsoever.

Second. If the matters and things set forth in complainant's amended and supplemental bill of complaint, as amended, entitle the complainant to any relief whatsoever, they constitute a new, original and independent cause of action, not connected with or dependent upon the cause of action set forth in the original bill.

136 Wherefore, and for divers other good causes of demurrer appearing in complainant's amended and supplemental bill of complaint, as amended, these defendants demur thereto and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to said amended and supplemental bill of complaint, as amended, and pray to be

hence dismissed with their costs and charges in this behalf most wrongfully sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
FREDERICK W. LEHMANN,
SANFORD B. LADD,
Solicitors for Defendants.

FREDERICK W. LEHMANN,
SANFORD B. LADD,
Of Counsel.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

SANFORD B. LADD,
Of Counsel for Defendants.

The affidavit required by Equity Rule 31 is hereby expressly waived.

FRANK HAGERMAN,
Counsel for Complainant.

137 Afterwards, to-wit, on the 2nd day of August, 1907, the Demurrer of Lee Dunlap, et al., was filed. Said Demurrer is in words and figures as follows, to-wit:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3006.

THE CHICAGO AND ALTON RAILWAY COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

The Joint and Several Demurrer of Lee Dunlap and Fred C. Urfer, Two of the Defendants Herein, to Complainant's Original Bill of Complaint, its Amended and Supplemental Bill and the Amendment to said Bill of Complaint.

These defendants, by protestation, not confessing all or any of the matters and things in complainant's original bill of complaint, its amended and supplemental bill, and the amendment to said bill of complaint to be true in such manner and form as the same are therein set forth and alleged, demur thereto, and for cause of demurrer show that the said complainant has not in and by said original bill of complaint, its amended and supplemental bill, and the amendment to said bill of complaint, made or stated any such cause as doth or ought to entitle it to the relief thereby sought and prayed for from or against these defendants or either of them.

138 Wherefore, and for divers other good causes of demurrer appearing in said original bill of complaint, the said amended and supplemental bill, and the said amendment to the bill of complaint, these defendants respectively demur thereto and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to the said original bill of complaint, the said amended and supplemental bill, and the amendment to the bill of complaint, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
FREDERICK W. LEHMANN,
SANFORD B. LADD,
Solicitors for Defendants.

FREDERICK W. LEHMANN,
SANFORD B. LADD,
Of Counsel.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

SANFORD B. LADD,
Of Counsel for Defendants.

The affidavit required by Equity Rule 31 is hereby expressly waived.

FRANK HAGERMAN,
Counsel for Complainant.

139 Afterwards, to-wit, on the 24th day of September, 1907, an Interlocutory Report of the Special Master was filed.

And afterwards, to-wit, on the 7th day of October, 1907, said Interlocutory Report, with the Order thereon, was refiled.

Said Interlocutory Report and the Order thereon are in words and figures as follows, to-wit:

Circuit Court of the United States, Western Division of the Western District of Missouri.

MISSOURI PACIFIC RAILWAY COMPANY
vs.
HERBERT S. HADLEY, Attorney General, et al.

CHICAGO, BURLINGTON & QUINCY RAILWAY CO.
vs.
HERBERT S. HADLEY, Attorney General, et al.

WABASH RAILROAD COMPANY
vs.
HERBERT S. HADLEY, Attorney General, et al.

Interlocutory Report of Special Master.

To the Honorable The Judges of said Court:

By reason of the premises hereinafter recited the undersigned Special Master to whom the above entitled and fifteen other like causes were referred by order of this Court bearing date March 5th, 1906, begs leave to present this special interlocutory report.

Having completed the taking of the evidence offered by the respective parties complainants and defendants in the three cases above named, these having been duly selected out of the eighteen for hearing in the first instance in pursuance of the order of reference, the same were set down for argument before the Master on June 18th, 1907. On said date, however, the complainants in all the cases, having immediately prior thereto filed their amended and supplemental bills in this Court, further proceedings before the Master were, by consent of all parties suspended subject to be resumed on due notice.

As appears in said amended and supplemental bills and
140 the several amendments thereof since filed, copies of all whereof have been duly received by the Master, there have been brought into these cases various new and additional matters not embraced in the issues so referred.

And being in doubt as to whether the filing of such amended and supplemental bills do of necessity or should, pending proceedings in Court thereon, operate as a stay of further proceedings before him and of his report upon the matters and issues so referred, the Special Master therefore submits this Interlocutory Report and respectfully prays for such further orders and directions in the premises as to the Court may seem meet.

F. L. SCHOFIELD,
Special Master.

The amendments pending the hearing of the original bills of complaint had the effect, in law, of uniting the matters complained of in one bill. They, therefore, constitute but one bill of complaint,

and all matters involved should be fully heard and the Master's findings should be embraced in a single report.

(Signed) JNO. F. PHILIPS, *Judge.*

October 7th, 1907.

141 Afterwards, to-wit, on the 13th day of November, 1907, the following order was filed and entered of record, to-wit:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO., Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Also

In Equity.

RAILROAD COMPANIES
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2998, 2999, 3000, 3001, 3002, 3003, 3004 and 3006.

Order.

This cause coming on for hearing this November 13, 1907, it is by consent of parties ordered that leave of court be and is hereby granted to amend complainant's "Amendment to complain-t's bill of complaint," by erasing and striking out of paragraph 15 thereof the words "between 12 and 1 o'clock A. M.," in lines 27 and 28 on page 2 and the words "at the said hours of" in lines 1 and 2 on page 3, and complainant's counsel are directed to forthwith make such erasure.

(Signed) SMITH McPHERSON, *Judge.*

142 Afterwards, to-wit, on the 10th day of April, 1908, the following order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3006.

CHICAGO & ALTON RAILROAD COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General, et al., Defendants.

Order.

This cause came on for hearing this 10th day of April, 1908, upon the demurrers herein filed. The parties appeared by their respective counsel, and the court, after argument, being fully advised in the premises, overruled said demurrers.

(Signed) SMITH McPHERSON, *Judge.*

143 Afterwards, to-wit, on the 12th day of May, A. D. 1908, the joint answer of John A. Knott, et al., was filed. Said answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3006.

THE CHICAGO & ALTON RAILWAY COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

The Joint Answer of the Defendants, John A. Knott, Frank Wightman, and H. R. Oglesby, Railroad Commissioners of the State of Missouri, to the Complainant's Amended and Supplemental Bill and the Amendment Thereto.

These defendants now, and at all times hereafter, saving to themselves all and all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the many errors and imperfections in said Amended and Supplemental Bill of complaint, as amended, for answer thereto, or to so much thereof as they are advised is material or necessary to make answer to, answering say:

That they do hereby adopt as their Answer herein the answer of Herbert S. Hadley, Attorney General of the State of Missouri, and all and singular the statements and averments thereof as fully as if the same were repeated herein, and they ask that the said Answer be taken in all respects as the Answer of them and of each of them.

These defendants deny that the complainant is entitled to any relief whatever against these defendants, without this, that any other

matter, cause or thing in the complainant's amended and sup-
144 plemental bill and the amendments thereto, contained, material or necessary for these defendants to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of these defendants, or any of them; to each of which matters and things these defendants are ready and willing to aver, maintain and prove, as this Honorable Court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
Ass't Attorney General,
Solicitors for Defendants.

SANFORD B. LADD,
F. W. LEHMANN,
Of Counsel.

Received copy of the above and foregoing Answer May 4, 1908.

E. L. SCARRITT,
FRANK HAGERMAN,
Solicitors for Complainant.

145 Afterwards, to-wit, on the 12th day of May, A. D. 1908, the answer of Herbert S. Hadley, Attorney General, was filed. Said answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3006.

THE CHICAGO & ALTON RAILWAY COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Answer of Herbert S. Hadley, Attorney General of the State of Missouri, to the Complainant's Amended and Supplemental Bill and the Amendment Thereto.

This defendant now, and at all times hereafter, saving to himself all and all manner of benefit, or advantage of exception, or otherwise, that can or may be had or taken to the many errors and imperfections in said Amended and Supplemental Bill of complaint, as amended, for answer thereto, or to so much thereof as he is advised is material or necessary to make answer to, answering says:

This defendant admits Paragraphs 1, 2, 3 and 4 of the Amended and Supplemental Bill.

This defendant denies that the Governor of the State, in giving his written reasons for approving the Act of 1905, referred to or indicated that it was with some reluctance that he signed the same.

And this defendant denies that any acknowledgment was made of the invalidity of the Act of 1905, referred to in Paragraphs 5 and 6 of the Amended and Supplemental Bill; but he admits that the Legislature of the State of Missouri did pass an act, effective June 14, 1907, in words and figures as set forth in Paragraph 6 of said Amended and Supplemental Bill.

But this defendant denies that it was the purpose or the intention of the defendant herein to attempt to enforce all penalties which may accrue if the said acts are held to be illegal.

This defendant admits that the Legislature of Missouri in 1907 passed the two acts set forth in Paragraph 7 of said Amended and Supplemental Bill.

And this defendant denies that if the complainant should charge the maximum rates prescribed by the acts of the General Assembly of the State of Missouri enacted at its session in 1907, the total gross receipts of the complainant from State traffic would be reduced in a very large sum, and denies that the said freight acts, or any of
146 them, are violative of the provisions of the Constitution to the same extent as complainant has alleged with respect to the Act of 1905, or to any extent whatever.

And this defendant denies that the rates fixed by the Acts of 1907 are unreasonable and confiscatory, and less than the cost of the service.

And this defendant denies that the Governor of the State of Missouri in calling for the passage of said Act of 1907, and the Legislature in passing the same, did so for the avowed purpose of increasing certain of the maximum rates of the Act of 1905, which they conceived had in this litigation been proved to be unreasonable and confiscatory, and could not be enforced.

And this defendant denies that the rates as finally fixed by the Acts of 1907 were not on such a basis as would return a reasonable and fair compensation to the complainant upon the value of that portion of its property devoted to such use.

And this defendant denies that if the laws in existence in 1905, relative to passenger fares, had remained in force, the freight rates, as fixed by said Acts of 1907, would be unreasonable or confiscatory, or that they would not give a just return upon the value of that portion of complainant's property devoted to said traffic.

This defendant denies that the Legislature of the State acted without any fixed or definite knowledge upon the subject of rates, or that they erroneously conceived that if the increase in freight rates were necessary and were made, there could be a general equalization of rates by a decrease in the passenger rates, and that thereby, in substance, they could legally overcome and offset any advantage from an increase in freight rates by decreasing the maximum rates to be charged for said passenger traffic about 33 1-3 per cent, and thus while defeating pending litigation, the public, as a whole, would not be the loser.

This defendant denies that the result was that as part and parcel of one transaction and substantially as one law, and to accomplish the purposes alleged in the Amended and Supplemental Bill, there was passed, and the Governor approved, an act called the "Passenger Act," taking effect on June 14, 1907; but this defendant admits that the act relative to passenger rates, in words and figures as set forth in said Paragraph 9 of the Amended and Supplemental Bill, was enacted by the Legislature of the State of Missouri.

And this defendant denies that the said act regulating passenger rates is violative of any provision of the Constitution of the State of Missouri, or of the United States, and denies that it is subject to any of the objections made in the original bill to the Act of 1905, and denies that any of the facts alleged in the original bill as to why the Act of 1905 should be held to be void and action thereunder restrained, are true as to the Acts of 1907, or of the said Passenger Act.

This defendant denies that the said Passenger Act will reduce the earnings of the complainant from its passenger business in the practical and ordinary operation of the road, or otherwise, substantially one-third, or in any amount whatsoever.

The defendant has no knowledge or information or belief as to the aggregate amount of the State passenger earnings for the year 1906, and he denies that if the Passenger Act aforesaid had been applied thereto, State earnings would have been reduced in any sum whatever.

147 And this defendant denies that the value of that portion of complainant's property devoted to the carriage of State business, considered as a whole, or separately, as to the passenger business only, is such in any case that the reduction in rates by said Passenger Act would fail to make a reasonable return on such valuation, and denies that it would cause such business to be done at an actual loss.

This defendant denies that the said Passenger Act was passed for the avowed purpose of reducing the State passenger rates of complainant so as to off-set and overcome the supposed increase of freight rates made under the Act of 1907, and denies that the attempt was made to frame each act so as to avoid the injunctive relief in this or in each action heretofore instituted by railroad companies operating lines in Missouri.

And this defendant denies that if the injunction be not granted herein, the complainant is without means of adequate and proper relief, or would be denied due process of law. And this defendant alleges the fact to be that in the suit instituted by the State of Missouri to require by mandamus or mandatory injunction the observance of the laws of the said State, every defense, which the complainant herein and defendant in said suit may have, could be presented and considered, and the State of Missouri is contemplating no suit of any kind which would in any manner embarrass the complainant in the assertion of any rights which it may have.

This defendant says that it is not true that the special duties devolving upon the members of the Board of Railroad Commissioners

and the Attorney-General, as stated in the original bill, apply to the Acts of 1907, and the Passenger Act aforesaid.

And this defendant denies that it is necessary or proper that the county judges and county treasurers of the State of Missouri should be made parties to this litigation, or that any private person should be drawn in as defendant thereto.

This defendant denies that the rates fixed by each, or any of the said Acts of 1907, or by said Passenger Act, or that the rates fixed by all of said acts, as a whole, are unreasonable or confiscatory, or that they will force an unreasonable reduction or confiscation of complainant's entire revenue, or of any part thereof, or that the said acts, or any of them, are in violation of the provisions of the Fourteenth Article of Amendment to the Constitution of the United States, or of any other provision of said Constitution.

And this defendant denies that to enforce the rates fixed by any of said acts would necessarily affect the interstate rates upon the same commodities. And this defendant alleges the fact to be that for many years past the complainant has voluntarily carried passengers in the State of Missouri, whose travel was wholly within the State, at the rate of two cents per mile. It has also carried many persons, other than employés of their own or other railroad companies, without exacting any compensation whatsoever, and the great bulk of passenger transportation within the State has been for many years past conducted at approximately two cents per mile, and the charge of three cents exacted by complainant of any person was an unjust, excessive and discriminatory charge upon such persons.

Referring to Subdivision (*b*) of Paragraph 11 of complainant's Amended and Supplemental Bill, this defendant says that the real purpose of the original bill herein was to determine whether
148 that portion of the property of complainant devoted to State freight business, could, if the Act of 1905 were enforced, receive such return upon its value as would be fair, reasonable and not confiscatory, and that upon the trial of the three cases heard by the Special Master such was the theory adopted by both parties, and the proofs were by both of them directed to that end. And this defendant avers that the only legitimate and proper inquiry in this suit is as to the questions of law and fact arising upon the issues made by the original Bill and the Answer thereto, as to the validity of the said Act of 1905, and the results of its operation, and whether the same, if enforced, would be confiscatory and unremunerative to the complainant. Defendant asserts that the purpose of the original Bill ought not to be, and cannot, without disregard of the established rule of procedure of the Court of Chancery, be changed and perverted, to the end that the effect of the freight rate Act, or the passenger rate Act of 1907, shall be considered in this litigation, and that the only question proper to be considered or determined by this court in this action is the consequences to the complainant of the enforcement of the said Act of 1905.

This defendant denies that on the 11th day of June, 1907, the complainant filed herein a written application for leave to file an Amended and Supplemental Bill, and he denies that upon the same

day there was served upon the counsel for the defendants in the original Bill herein, and accepted by them, a written notice that a copy of the form of the said Amended and Supplemental Bill, reciting that application to file same and for a temporary injunction would be presented to this Court upon June 14, 1907, at the opening of said court at 10 a. m.

And he denies that two petitions in equity in the name and on behalf of the State of Missouri, referred to in Paragraph 15 of the said Amended and Supplemental Bill, as amended, were filed by him in disregard or in contempt of the jurisdiction of this Court; and he alleges the fact in that regard to be that on the said 14th day of June, A. D. 1907, and between the hours of 8 and 9 in the morning of the said day, he did, in the name and on behalf of the State of Missouri, by virtue of his office and authority as Attorney-General of the said State, file two petitions of the State of Missouri, the same being petitions in equity against the complainant herein, as defendant in the said suits, the one asking that the said complainant herein, defendant in the said suit, be required to comply with the maximum freight rates provided by the laws of the State of Missouri, enacted at the legislative session of the year 1907, and the other asking that the said complainant herein, defendant in the said suit, be required to comply with the passenger rates fixed by the laws of the State of Missouri, enacted at the legislative session of the year 1907, and the said petitions were filed in the Circuit Court of the State of Missouri in and for Jackson county, at Kansas City, the same being a court of the State of Missouri of competent and general jurisdiction, and the said petitions were filed, and the suits instituted thereby, were pending and summons, according to the laws of the State of Missouri, issued upon the said petitions and served upon the complainant herein, defendant therein, before the hour of 10 o'clock a. m. of said 14th day of June, 1907, and before any Amended or Supplemental Bill, or any amendment to the original Bill herein was filed by the complainant, or before any such amended or Supplemental Bill, or amendment to the original Bill was presented to this Court for consideration.

And this defendant alleges further that the said petition in equity, so as aforesaid filed by him in the Circuit Court of Jackson
149 county relative to the freight rates, has been dismissed by him, and is no longer pending, but that the said petition in equity, so as aforesaid filed by him in the Circuit Court of Jackson county, at Kansas City, relative to the passenger rates, is still pending and undetermined.

And this defendant admits that the said Circuit Court of Jackson county did on the said 14th day of June, A. D. 1907, issue its restraining order, returnable upon the 24th day of June, 1907, in the said suit in equity relative to the said passenger rates, requiring the complainant herein, and defendant therein, to comply with the law of the State of Missouri in that behalf.

This defendant admits that upon the 14th day of June, 1907, at 10 a. m., there were presented to this Court the application of complainant for leave to file its Amended and Supplemental Bill, and for a temporary injunction, and that a continuance of the hearing of said

application for one day was granted by the said court, and that this Court, upon its own motion, made the orders stated and referred to in Paragraph 16 of the said Amended and Supplemental Bill, as amended.

This defendant admits that upon June 17, 1907, this Court made and entered the order set forth in Paragraph 17 of the said Amended and Supplemental Bill, as amended.

And this defendant further admits that subpœnas have been issued, as by the said order provided, and served upon this defendant.

This defendant admits that upon June 24, 1907, the said Circuit Court of Jackson county, upon the application of this defendant, entered an order dismissing the petition in equity of the State of Missouri, theretofore filed by him, relative to the freight rates prescribed by the laws of the State of Missouri, and that upon the same day, upon his application, the said court entered an order setting aside the restraining order previously issued by it in the suit in equity of the State of Missouri against this complainant, as defendant therein, relative to the passenger rates prescribed by the laws of the State of Missouri.

And this defendant avers that he made his application to set aside the said restraining order because this complainant had put into effect the passenger rates prescribed by the laws of the State of Missouri and was fully observing the same, and has continued so to do to the present time.

This defendant admits that he did not dismiss the said suit in equity, relative to the passenger rates, and has insisted that it should remain pending, and that it is his purpose to proceed therewith, if the complainant herein, defendant in the said suit, shall, at any time hereafter, cease to comply with the laws of the State of Missouri relative to passenger rates in said State.

And this defendant denies that the said State court has no jurisdiction in the premises, or that it has no right or power to compel complainant herein and defendant in the said suit, to put in force the passenger rates referred to, and he denies that any action by the said court would deny to complainant the protection accorded to it by the Fourteenth Amendment to the Constitution of the United States, and he alleges the fact in that regard to be that the said Circuit Court of Jackson county is a court of competent and general jurisdiction, having jurisdiction alike of the person of the complainant herein, defendant in the suit pending in the said Circuit Court of Jackson county, and that due process of law can and will be had by the complainant herein, defendant in the said suit, in the said suit,
and any defense that it may have to the said suit in equity,
150 so as aforesaid brought by the State of Missouri in said Circuit Court of Jackson county, can and will be fully and fairly heard by said Circuit Court of Jackson county, and any rights which the complainant herein, defendant in the said suit, in said State court may have, will be fully conserved and protected.

This defendant denies that the facts alleged in Paragraphs 13 to 18, inclusive, of the Amended and Supplemental Bill, as amended, are true as to each or any of the several railroad companies named in

Paragraph 20 of the said Amended and Supplemental Bill, as amended, except as they correspond with the admissions and averments hereinbefore set forth in this Answer.

This defendant admits that each of said companies had filed original bills in this Court similar to the original bill filed by the complainant herein.

This defendant also admits that the suits in equity brought by the State of Missouri were brought against the several railroad companies named in said Paragraph 20 either in the Circuit Court of Jackson county, or in the Circuit Court of the City of St. Louis, as in said paragraph stated.

And this defendant admits that it is his purpose to prosecute the said suits in equity, so brought by the State of Missouri in its said courts, in relation to the passenger rates, in the event that the said companies, defendants in said suits, shall fail to continue in observance of the passenger rates prescribed by the laws of the State of Missouri.

And this defendant denies that as to any of the complainants in the suits pending in the Circuit Court of the United States, defendants to the suits brought by the State of Missouri, restraining orders from the said State courts were served in the court room of this Court while the said parties, or any of them, were presenting applications to this Court upon June 14, 1907, but, on the contrary, this defendant alleges the fact to be in that regard that the said restraining orders were all served upon the proper officers of the said companies at their respective offices.

And this defendant denies that the said Passenger Act of 1907, and that each or any of the freight acts of the State of Missouri of 1907, is void and of no effect, for the reason that it is an attempt to deprive complainant of its property without due process of law, or denies the complainant the equal portection of the law, and he alleges the fact in that regard to be that the said Passenger Act of 1907 is a reasonable and proper regulation of passenger rates in the State of Missouri, and that each of said freight acts of 1907 is a reasonable and proper regulation of rates for the transportation of freight; and that the said rates so prescribed by the said several acts of the General Assembly of the State of Missouri, and each of them, prescribe fair, proper and remunerative rates for the service to which the said acts severally relate.

And this defendant denies that the penalties provided by the said acts for a violation of them are harsh and unreasonable, or that they could in anywise be made burdensome, except through a persistent and continued disregard of the law by the said complainant.

This defendant denies that the said acts, or any of them, influence, affect or bear upon interstate freight and passenger traffic, or that they, or any of them, fix and regulate interstate freight and passenger traffic.

As to whether the Kansas City, Clinton & Springfield Railway Company, and the St. Louis & San Francisco Railroad Company, between Kansas City and Springfield, are of substantially
151 & 152 the same length, or as to whether the line of the former between those points extending into and out of Kansas,

or whether all its carriage between said points is interstate, or whether the other company has one line which in its course runs into and out of a portion of Kansas, and another separate line between said points which extends wholly through Missouri, or whether the carriage between said points upon one line is interstate and upon the other state; or whether between Joplin and Kansas City there are three trunk lines of substantially the same length, some of which are within the State, and some of which are without the State, or whether all of the traffic on some of said lines between Joplin and Kansas City is State, and on other of said lines, between said points, is interstate; or whether between St. Louis and St. Joseph, Missouri, the line of the Chicago, Burlington & Quincy Railroad Company does not pass out of the State, or whether the traffic on said road between said points on said line is wholly State; or whether the line of the Missouri Pacific Railway Company between said St. Louis and St. Joseph in its course passes into and out of the state of Kansas, or whether the entire traffic upon said railway between said points is interstate; or whether between Kansas City and St. Joseph, Missouri, there are four trunk lines of substantially equal length, some of which are wholly within Missouri, and upon some of which all their traffic between said points is State, or whether the lines of some of them pass into and out of Kansas, or the entire traffic upon them, between said points, is wholly interstate, this defendant has no knowledge, information or belief.

This defendant admits that some of the large and populous communities of the State are upon its eastern and western borders. He admits that the main course of part of the traffic through the State is east and west. He has no knowledge, information or belief as to whether all of the railroads in the State either operate lines extending into other states, or into the state of Kansas or Illinois, or whether any of them have joint freight and passenger traffic arrangements with lines running into those states, or interstate carriage for freight and passengers.

As to whether the interstate passenger rates are higher than those fixed by the Passenger Act of 1907, or whether passengers starting from points in Missouri to go to other states buy tickets at two cents a mile to the last station in Missouri upon its border, and then buy tickets or pay fare from thence to their interstate destination, and vice versa, this defendant has no knowledge, information or belief.

As to what the interstate rate from St. Louis to Topeka, Kansas, is, or has been, this defendant has no knowledge, information or belief; or as to whether a passenger starting from St. Louis to Topeka buys his tickets in the manner stated in the Amended and Supplemental Bill, as amended.

He denies that the lowering of the State rate for the transportation of passengers necessarily affects, fixes or lowers the interstate passenger rate, and he denies that the same is true of the freight traffic.

This defendant denies that the complainant is entitled to any relief whatever against this defendant, without this, that any other

matter, cause or thing in the complainant's Amended and Supplemental Bill and the amendments thereto, contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready
153 and willing to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
Assistant Attorney General,
Solicitors for Defendant.

SANFORD B. LADD,
FRANK HAGERMAN,
Of Counsel.

Received copy of the above and foregoing Answer May 4, 1908.

E. L. SCARRITT,
FRANK HAGERMAN,
Solicitors for Complainant.

154 Afterwards, to-wit, on the 1 day of June, 1908, a replication was filed.
Said replication is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3006.

CHICAGO & ALTON RAILROAD COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Replication of Complainant to the Joint Answer of John A. Knott, Frank Wightman, and H. R. Oglesby, Railroad Commissioners of the State of Missouri, to the Complainant's Amended and Supplemental Bill and the Amendment Thereto.

This replicant saving and reserving to itself all and all manner of advantage of exception which may be had or taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendants for replication thereunto, saith: That it does and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants, is very uncertain, evasive

and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

FRANK HAGERMAN,
Solicitors for Complainant.

EDWARD L. SCARRITT,
Of Counsel.

155 Afterwards, to-wit, on the 1 day of June, 1908, a replication was filed.

Said replication is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3006.

CHICAGO & ALTON RAILROAD COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

Replication of Complainant to the Answer of Herbert S. Hadley, Attorney General of the State of Missouri, to the Complainant's Amended and Supplemental Bill and the Amendment Thereto.

This replicant saving and reserving to itself all and all manner of advantages of exception which may be had or taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendant for replication thereunto, saith: That it does and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant, is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

FRANK HAGERMAN,
Solicitors for Complainant.

EDWARD L. SCARRITT,
Of Counsel.

156 Afterwards, to-wit, on the 13th day of June, 1908, the following order was filed and entered of record, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General, et al., Defendants.

And also

In Equity.

RAILROAD COMPANIES
v.
HERBERT S. HADLEY, Attorney General, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

Order.

Causes numbered 2988, 2989, 2990, 2991, 2995, 2997, 3001, 3002, 3003 and 3006 came on for hearing this June 13, 1908, upon the application of complainants to at once set down for hearing their applications for temporary injunctions. The parties appeared by counsel, the defendants insisting that such hearing be postponed for a period of ninety days, and the court being fully advised in the premises Orders,

1. The Special Master shall file herein so much of the testimony as has been taken in any of the 18 cases.

2. Orders on the applications to set down for hearing at once the motions for temporary injunctions are deferred for the present, and in lieu thereof by consent of counsel all of the 18 cases are set for final hearing the 5th day of October, 1908, or as soon thereafter as the court can hear the same upon such evidence as has been heretofore taken, and such further oral and documenttary evidence as then may be offered under the 67th rule in equity as amended.

(Signed) SMITH McPHERSON, *Judge.*

157 Afterwards, to-wit, on the 13th day of June, 1908, an Affidavit was filed. Said affidavit is in words and figures as follows:

STATE OF MISSOURI,
City of St. Louis, ss:

T. F. Wharton, being first duly sworn, says that he is Manager of the Saint Louis Office of Haskins & Sells, Certified Public Account-

ants, and has been for the past three years; that the firm of Haskins & Sells has been employed by the State of Missouri for the past two years as expert accountants in connection with the Maximum Freight Rate Litigation and the Passenger Rate Litigation; and that as Manager of the Saint Louis Office, this affiant has been connected with all of said work and is familiar therewith and with the length of time required for such work; that he was asked by the Attorney General on the 9th day of June, 1908, to come to Jefferson City for the purpose of making an examination of statements filed on that date by the following named railroads:

Missouri Pacific Railway Company,
Missouri, Kansas & Texas Railway System,
Chicago Great Western Railway Company,
Chicago, Rock Island & Pacific Railway Company,
St. Louis & San Francisco Railroad Company,
St. Louis Southwestern Railway Company,
Chicago & Alton Railroad Company,
St. Joseph & Grand Island Railway Company,
Kansas City, Clinton & Springfield Railway Company,
Atchison, Topeka & Santa Fe Railway Company,

such examination to be made in order to determine the length of time necessary for the verification of the reports submitted by the aforesaid railroad companies and for the preparation of reports in relation thereto; that on the 10th day of June, 1908, this affiant went to Jefferson City for the purpose indicated; that he then
158 received from Attorney General Hadley the statements referred to, and more particularly described in Exhibits "A" to "J" hereto attached and made a part of this affidavit; Further, that in order to properly pass upon the reports referred to, it will be necessary First, to verify the clerical accuracy of the figures themselves; Second, to verify the correctness of the comparisons made where there have been such comparisons, and where no comparisons have been made, it will be necessary to prepare, or have prepared proper comparative statements; Third, to verify the correctness of the division of expenses between freight and passenger business and between State and Inter-State business; and Fourth, it will be necessary to compare the method used in dividing expenses with the method by which such expenses were divided by the Missouri Pacific, Burlington and Wabash Railroads in the testimony already heard in the maximum Freight Rate cases. In addition to this, it will be necessary to secure information in other states, where there has been no change in passenger rates during the past two years, as to the effect on Passenger earnings of the business depression, which began about the middle of October, 1907. It will also be necessary to secure from other states where the two cent passenger law has been in effect for some time, information showing the effect of the operation of the law on the earnings of the railroad companies.

In view of the amount of work above outlined that it will be necessary to do in connection with the statements hereinbefore referred to, this affiant believes that it will require the services of four or five

experienced accountants for about three months to make the necessary verifications, prepare the necessary statistics and place in proper form all such matters for the information of the Court.

T. F. WHARTON.

Subscribed and sworn to Before me this 11th day of June, 1908. Commission expires Jan'y 14, 1911.

FRANK WELLER,
[SEAL.] *Notary Public, City of St. Louis, Mo.*

NOTE.—In the attached exhibits, the word "State" is used to indicate "Intra-State" business.

159 EXHIBIT "A."

Missouri Pacific Railway Company.

Statements Showing Passenger Earnings by Months for the Six Months Ended December 31, 1907 and 1906, Divided Between State and Interstate, with Expenses for the Periods Named; Also Reports Showing Freight Earnings and Expenses for the Same Periods.

Method of dividing expenses and charges between freight and passenger, and State and Inter-State business is not shown.

Summary of Intrastate Passenger Business Only as Shown by Statements for the Six Months Ended December 31.

	1907.	1906.	Increase.
July to October.....	$580,056.65	$564,593.97	$15,462.68
November and December	218,420.34	245,212.35	26,792.01*†
Total.....	$798,476.99	$809,806.32	$11,329.33*†
Operating Expenses....	728,676.35	664,730.09	63,946.26
Net Earnings.....	$69,800.64	$145,076.23	$75,275.59*†
Charges, not Including Interest	23,980.87	8,582.45*	32,453.32
Available for Interest and Dividends.....	$45,929.77	$153,658.68	$107,728.91*†

[*In red ink in copy.]
† Decrease.

160 EXHIBIT "B."

Missouri, Kansas & Texas Railway System.

Various Monthly Statements of Passenger and Freight Earnings and Expenses for the Period from June 19 to December 31, 1907, with Statements by Months for the Period from June 19 to September 18, 1907 and 1906.

State and Inter-state business is not separated in reports.
Method of dividing expenses between freight and passenger business is not shown.

Summary of Passenger Earnings, Expenses and Charges, as Shown by Statements, for the Periods from June 19 to September 18.

	1907.	1906.	Increase.
Revenue	$365,573.83	$318,861.06	$46,712.77
Operating Expenses ...	235,619.96	225,148.53	10,471.43
Net Earnings.....	$129,953.87	$93,712.53	$36,241.34
Taxes and Rentals.....	25,381.17	27,261.31	1,880.14*†
Available for Interest and Dividends.....	$104,572.70	$66,451.22	$38,121.48

[*In red ink in copy.]
† Decrease.

161 EXHIBIT "C."

Chicago Great Western Railway Company.

Statements (Supposed to be Filed by this Company) Showing Passenger Earnings Only by Months for the Periods from June 19 to September 18, 1907 and 1906, and Also for the Three Months Ended September 30, 1907 and 1906, Divided Between State and Inter-State.

No expenses are given.

Summary of Passenger Earnings, as Shown by Statements for the Periods from June 19 to September 18.

	1907.	1906.	Decrease
Intra-State	$12,568.23	$14,604.75	$2,036.52
Missouri to Other States.	19,423.07	21,753.31	2,330.24
Other States to Missouri.	20,297.69	18,783.71	1,513.98*†
Other States through Missouri.....	1,225.86	1,047.64	178.22*†
Between Points in Missouri Through Kansas.	4,181.53	4,292.36	110.83
Total.....	$57,696.38	$60,481.77	$2,785.39

[*In red ink in copy.]
† Increase.

162 EXHIBIT "D."

Chicago, Rock Island & Pacific Railway Company.

Statement (Tentative Figures Only) for Period from June 19 (6 A. M.) to and Including September 18, 1907 and 1906, of Passenger and Freight Earnings, Expenses and Taxes.

Business is not divided between State and Inter-state.
Method of dividing expenses is not given.

Summary of Passenger Earnings, Expenses and Taxes, as Shown by Statement, for the Period Mentioned Above.

	1907.	1906.	Increase.
Revenue	$271,240.36	$246,701.04	$24,539.32
Operating Expenses:			
Maintenance of Way and Structures	$113,162.23	$85,857.89	$27,304.34
Maintenance of Equipment	48,251.58	37,947.48	10,304.10
Other Expenses	162,531.00	163,760.05	1,229.05*†
Total	$323,944.81	$287,565.42	$36,379.39
Deficit from Operations	$52,704.45	$40,864.38	$11,840.07
Taxes	5,411.14	3,946.88	1,464.26
Deficit before deducting Interest, etc	$58,115.59	$44,811.26	$13,304.33

[*In red ink in copy.]
† Decrease.

163 EXHIBIT "E."

St. Louis & San Francisco Railroad Company.

Statements by Months and in Total for the Three Months Ended September 30, 1907, of State and Inter-State Passenger and Freight Earnings, Expenses and Charges.

Method of dividing expenses and charges between Freight and Passenger business is not shown: Expenses and Charges, and Miscellaneous earnings are divided between State and Inter-State business on the basis of the actual earnings of each class of business.

No comparisons are made with the same periods of the previous year, under three-cent law.

Summary of Intra-State Passenger Business, as Shown by Statements, for the Three Months Ended September 30, 1907.

Revenue	$718,992.65
Operating Expenses	599,298.01
Net Earnings	$119,694.64
Taxes and Rentals	24,104.07
Available for Interest and Dividends	$95,590.57

164 EXHIBIT "F."

St. Louis Southwestern Railway Company.

Statement for Six Months Ended December 31, 1907, *of State and Inter-State Passenger and Freight Earnings, Expenses and Charges, with Memorandum of Bases Used in Dividing Revenues, Expenses and Charges between Freight and Passenger and State and Inter-State Business.*

Expenses are divided between Freight and Passenger business generally on basis of revenue train-miles. Expenses are divided between State and Inter-State business on basis of number of passengers one mile. Taxes are divided on basis of freight and passenger revenue of each class.

No comparisons are made with same period of previous year, under three-cent law.

Summary of Intra-State Passenger Earnings and Expenses, as Shown by Statement, for the Six Months Ended December 31, 1907.

Revenue	$29,625.21
Operating Expenses	31,407.27
Loss from Operation	$1,782.06
Taxes and Sundry Charges (Less Other Income)	1,224.67
Total Loss, before deducting Interest	$3,006.73

NOTE.—During the same period, the Inter-State business shows a profit, before deducting interest of $12,589.49.

165 EXHIBIT "G."

Chicago & Alton Railroad Company.

Statements for the Month of September, 1907, and the Three Months Ended September 30, 1907, and for the Month of October, 1907, and the Four Months Ended October 31, 1907, of Passenger Earnings, Expenses and Fixed Charges, Divided between State and Inter-State Business.

Method of apportioning expenses and charges to Passenger business is not shown. The method of dividing expenses between State and Inter-State business is not shown; but it is evidently on basis of passenger miles; charge divided between State and Inter-State Passenger business on basis of passenger miles.

No comparions are made with same periods of previous year, under three-cent law.

Summary of Intra-State Passenger Earnings and Expenses, as Shown by Statements, for Four Months Ended October 31, 1907

Revenue	$193,822.87
Operating Expenses	116,267.44
Available for Interest and Charges	$77,555.43
Amount of Interest and Charges	62,283.85*
Surplus for the period	$15,271.58

*Amount of Interest alone not given.

166 EXHIBIT "H."

St. Joseph & Grand Island Railway Company.

Statement of Passengers Carried and Revenue Received, by Months, for the Six Months Ended December 31, 1907 and 1906, Divided between State and Inter-State.

No expenses are given.

Summary of Passenger Earnings, as Shown by Statements, for the Six Months Ended December 31.

	1907.	1906.	Increase.
Intra-State	$20,101.43	$25,115.93	$5,014.50
Inter-State	9,718.42	11,384.51	1,666.09
Total	$29,819.85	$36,500.44	$6,680.59

167 EXHIBIT "I."

Kansas City, Clinton & Springfield Railway Company.

Statements of Passengers Carried and Revenue Received, by Months, with Expenses Charged to Passenger Traffic, for the Period from June 19 to November 30, 1907 and 1906.

Expenses are not divided between State and Inter-State business. The method of apportioning expenses to Passenger business is not given.

Summary of Passenger Earnings and Expenses, as Shown by Statements, for the Periods Shown Above.

Earnings:	1907.	1906.	Increase.
Intra-State	$24,319.00	$26,159.57	$1,840.57*†
Inter-State	22,171.38	22,043.20	128.18
Total	$46,490.38	$48,202.77	$1,712.39*†
Operating Expenses	92,633.11	92,378.03	255.08
Deficit from Operations	$46,142.73	$44,175.26	$1,967.47

[*In red ink in copy.]
† Decrease.

168 EXHIBIT "J."

Atchison, Topeka & Santa Fe Railway Company.

Statements for the Months of July, August, and September, 1907 and 1906, Showing Passenger and Freight Business, with Expenses of Each, and Statements for the Three Months Ended September 30, 1907, and 1906, Showing Passenger and Freight Earnings, Expenses, and Charges Divided Between State and Interstate Business.

Method of dividing expenses and charges between freight and passenger business is not shown. Expenses are divided between State and Inter-State business on basis of earnings of each class of business.

Summary of Intrastate Passenger Business, as Shown by Statements for the Three Months Ended September 30.

	1907.	1906.	Increase.
Revenue from Passengers.	$56,329.47	$50,959.63	$5,369.84
Excess Baggage, Mail, Express, etc.	24,531.16	24,162.71	368.45
Total	$80,860.63	$75,122.34	$5,738.29

Operating Expenses:			
Maintenance of Way and Structures	$31,779.37	$28,871.00	$2,908.37
Maintenance of Equipment	9,984.00	7,375.10	2,608.90
Other Expenses	28,706.04	27,955.42	750.62
Total	$70,469.41	$64,201.52	$6,267.89
Net Earnings	$10,391.22	$10,920.82	$529.60*†
Taxes and Rentals	1,647.99	1,624.68	23.31
Available for Interest and Dividends	$8,743.23	$9,296.14	$552.91*†

[*In red ink in copy.]
*†Decrease.

169 Afterwards, to-wit, on the 13th day of June, 1908, a Notice was filed. Said Notice is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

St. Louis & San Francisco Railroad Company, Complainant,
vs.
Herbert S. Hadley, Attorney General, et al., Defendants.

And also

In Equity.

Railroad Companies
v.
Herbert S. Hadley, Attorney General, et al., Being Cases Numbered 2989, 2990, 2991, 2995, 2997, 3001, 3002, 3003, and 3006.

Notice.

Complainants in above numbered cases will, upon June 13th 1908, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, make application to the court to set down for hearing the application for temporary injunctions therein pending.

FRANK HAGERMAN,
Solicitor for Complainants.

Received copy of above notice this June 8th, 1908.

HERBERT S. HADLEY,
Attorney General;
JOHN KENNISH,
SANFORD B. LADD,
F. W. LEHMANN,
Solicitors.

170 Afterwards, to-wit, on the 21st day of September, 1908, the Master's Return to order of June 13, 1908, was filed. Said Master's Return is in words and figures as follows, to-wit:

Circuit Court of the United States, Western Division of the Western District of Missouri.

No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY
vs.
HERBERT S. HADLEY, Attorney General, et al.

Also

RAILROAD COMPANIES
vs.
HERBERT S. HADLEY, Attorney General, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004 and 3006.

Master's Return to Order of June 13, 1908, With all Testimony Taken.

To the Honorable the Judges of said Court:

In obedience to the order entered in the above mentioned cases, bearing date of June 13, 1908, the undersigned Special Master herewith returns all the testimony taken before him in the three cases in which testimony was taken, viz. the cases of the Missouri Pacific Railway Company, the Chicago, Burlington & Quincy Railway Company, and the Wabash Railroad Company, together with all the exhibits referred to in said testimony, and being all the testimony taken in any of the said eighteen cases.

Respectfully submitted,

F. L. SCOFIELD,
Special Master.

Hannibal, Mo., September 18th, 1908.

171 Afterwards, to-wit, on the 5th day of October, 1908, the following order was filed and entered of record, to-wit:

In the Circuit Court of the United States, Western District of Missouri.

In Equity. No. 2988.

St. Louis & San Francisco Railroad Company, Complainant,
vs.
Herbert S. Hadley, Attorney General, et al., Defendants.

And also

Railroad Companies
against
Herbert S. Hadley, Attorney General, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3006, all in Equity in said Court.

Orders.

These cases came on for further hearing this October 5th, 1908, pursuant to the orders in all said cases made June 13th, 1908.

And the Court orders that each, all and every of said eighteen (18) cases be and the same are hereby continued until November ninth (9th) A. D. 1908, at ten o'clock A. M., at which time all of said cases will be called for trial, and the trials will then proceed from day to day until concluded. And said cases will be heard and decrees rendered on the evidence heretofore taken before the Special Master, and on such oral testimony and documentary evidence as may be offered by any of the parties to said cases pursuant to General Equity Rules 67 as amended. The evidence taken in any one of said cases shall be used in each, all and every of the other seventeen (17) cases in so far as the same will be pertinent or germane.

172 Said cases wil- be called and heard in the numerical order given said cases by the clerk; that is to say, the case with the lowest numerical number to be first heard, and the next lowest number next heard, and so on until all said cases are heard.

All agreements between any of the parties in any of said cases, whether such agreements are recited in orders of this court or by the Special Master, or whether such agreements are otherwise in writing, or verbally made, are hereby cancelled and will not be regarded by the Court and future agreements if any will only be considered by the Court when reduced to writing and signed by the parties and filed with the clerk in said case or cases.

However, the orders, made in said cases June 13th, 1908, and the agreements therein recited are fully ratified and confirmed except only as to the change of date for hearing from October 5th, 1908 to November 9th, 1908.

And the applications for temporary injunction are continued until

November 9th, 1908, or until such later time as said applications may be presented, and the court may be able to hear the same.

Done in open court this October 5th, 1908.

(Signed) SMITH McPHERSON, *Judge.*

Afterwards, to-wit, on the 14th day of December, 1908, the following order was filed and entered of record, to-wit:

UNITED STATES OF AMERICA, *set:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

173 In Equity

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004 and 3006.

MONDAY, *November* 9, *A. D.* 1908.

This day come the parties by their solicitors, the complainant by W. F. Evans, Esq., and Frank Hagerman, Esq., and the defendants by the Honorable Herbert S. Hadley, F. H. Lehmann, Esq., and Sanford B. Ladd, Esq. Thereupon this cause coming on regularly for final hearing, evidence on the part of complainant is begun and the same not being concluded at the hour of adjournment, further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge*

Afterwards, to-wit, on the 14th day of December, 1908, the following order was filed and entered of record, to-wit:—

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al

Also

In Equity

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al. al, Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

TUESDAY, *November* 10, 1908.

Now on this day again come the parties by their solicitors. Thereupon the hearing of evidence on the part of complainant is proceeded with and the same not being concluded at the hour
174 of adjournment further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

Afterwards, to-wit, on the 14th day of December, 1908, the following order was filed and entered of record, to-wit:—

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al, Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

WEDNESDAY, *November* 11, 1908.

Now on this day again come the parties by their solicitors. Thereupon the hearing of evidence on the part of complainant is pro-

ceeded with and the same not being concluded at the hour of adjournment further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge*

175 Afterwards, to-wit, on the 14th day of December, 1908, the following order was filed and entered of record, to-wit:

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

THURSDAY, *November* 12, 1908.

Now on this day again come the parties by their solicitors. Thereupon the hearing of evidence on the part of complainant is proceeded with and the same not being concluded at the hour of adjournment, further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

Afterwards, to-wit, on the 14th day of December, 1908, the following order was filed and entered of record, to-wit:

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

176 VS.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES

VS.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

FRIDAY, *November* 13, 1908.

Now on this day again come the parties by their solicitors. Thereupon the hearing of evidence on the part of complainant is proceeded with and the same not being concluded at the hour of adjournment, further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

Afterwards, to-wit, on the 14th day of December, 1908, the following order was filed and entered of record:

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

VS.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES

VS.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

SATURDAY, *November* 14, 1908.

177 Now on this day again come the parties by their solicitors. Thereupon the hearing of evidence on the part of complainand is proceeded with and the same not being concluded at

the hour of adjournment, further proceedings are postponed until Monday, December 14th.

(Signed) SMITH McPHERSON, *Judge.*

Afterwards, to-wit, on the 15th day of December, 1908, the following order was filed and entered of record, to-wit:

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

Now on this day again come the parties by their solicitors. Thereupon the hearing of evidence on the part of complainant is proceeded with and the same not being concluded at the hour of adjournment, further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

Monday, December 14, 1908.

Afterwards, to-wit, on the 16th day of December, 1908, the following order was filed and entered of record:

178 UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

Now on this day again come the parties by their solicitors. Thereupon the hearing of evidence on the part of complainant is proceeded with and the same not being concluded at the hour of adjournment, further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

Tuesday, December 15, 1908.

Afterwards, to-wit, on the 17th day of December, 1908, the following order was filed and entered of record, to-wit:

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES

vs.

179 HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

Now on this day again come the parties by their solicitors. Thereupon the hearing of evidence on the part of complainant is proceeded

with and the same not being concluded at the hour of adjournment, further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

Wednesday, December 16, 1908.

Afterwards, to-wit, on the 18th day of December, 1908, the following order was filed and entered of record, to-wit:

UNITED STATES OF AMERICA, *set:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

Now on this day again come the parties by their solicitors. Thereupon the hearing of evidence on the part of complainant is proceeded with and the same not being concluded at the hour of adjournment, further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

Thursday, December 17, 1908.

180 Afterwards, to-wit, on the 19th day of December, 1908, the following order was filed and entered of record, to-wit:

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

Now on this day again come the parties by their solicitors. Thereupon the hearing of evidence on the part of complainant is proceeded with and the same not being concluded at the hour of adjournment, further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

Friday, December 18, 1908.

Afterwards, to-wit, on the 21st day of December, 1908, the following order was filed and entered of record, to-wit:

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

181

Also

In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

This day again come the parties by their attorneys. Thereupon evidence on the part of the complainant, St. Louis & San Francisco

Railroad Co., is concluded and further proceedings are postponed until next Tuesday morning at nine o'clock.

(Signed) SMITH McPHERSON, *Judge.*

Saturday, December 19, 1908.

Afterwards, to-wit, on the 22nd day of December, 1908, the following order was filed and entered of record, to-wit:—

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

Now on this day again come the parties by their solicitors. Thereupon the hearing of evidence on the part of defendants is begun and the same not being concluded at the hour of adjournment, further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

Tuesday, December 22, 1908.

182 Afterwards, to-wit, on the 23rd day of December, 1908, the following order was filed and entered of record, to-wit:—

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

This day again come the parties by their attorneys. Thereupon further evidence upon the part of the defendants is heard and the same not being concluded at the hour of adjournment, further proceedings are postponed until Monday, December 28, 1908, at nine o'clock.

(Signed) SMITH McPHERSON, *Judge.*

Wednesday, December 23, 1908.

Afterwards, to-wit, on the 28th day of December, 1908, the following order was filed and entered of record, to-wit:—

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

183 Also

In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

This day again come the parties by their solicitors. Thereupon the hearing of evidence is proceeded with and further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

December 28, 1908.

Afterwards, to-wit, on the 29th day of December, 1908, the following order was filed and entered of record, to-wit:—

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD CO.

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al.

Also

In Equity.

RAILROAD COMPANIES

vs.

HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, and 3006.

This day again come the parties by their solicitors. Thereupon the hearing of evidence is proceeded with and further proceedings are postponed until tomorrow morning.

(Signed) SMITH McPHERSON, *Judge.*

December 29, 1908.

184 Afterwards, to-wit, on the 29th day of December, 1908, a Stipulation was filed. Said stipulation is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3006.

CHICAGO & ALTON RAILROAD COMPANY, Complainant.
vs.
HERBERT S. HADLEY et al., Defendants.

Stipulation.

It is hereby agreed that this case shall abide by the orders, judgments and decrees that may be made and entered in case No. 2998, Chicago, Burlington & Quincy Railroad Company vs. Herbert S. Hadley, et al.

FRANK HAGERMAN,
EDWARD L. SCARRITT,
Solicitors for Complainant.
HERBERT S. HADLEY,
JOHN KENNISH,
Solicitors for Defendants.

W. C. SCARRITT,
E. H. JONES,
Of Counsel for Complainant.

185 Afterwards, to-wit, on the 29th day of December, 1908, the following order was filed and entered of record:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 3006.

CHICAGO & ALTON RAILROAD COMPANY, Complainant.
vs.
HERBERT S. HADLEY et al., Defendants.

Now on this day in accordance witih the stipulation of parties filed herein it is ordered that this case shall abide by the orders, judgments and decrees that may be made and entered in case No. 2998, Chicago, Burlington & Quincy Railroad Company, vs. Herbert S. Hadley, et al.

(Signed) SMITH McPHERSON, *Judge.*

Dec. 29, 1908.

186 Afterwards to-wit, on the 30th day of December, 1909, Complainants' Requests for Findings of Fact was filed. Said Requests are in words and figures as follows, to-wit:

Complainants' Requests for Findings of Fact.

1. The complainants are the eighteen railroad corporations owning and operating lines of railway in Missouri, engaged generally in doing therein with the same property, the entire state and interstate railroad business. With the exception hereinafter stated as to the St. Louis & Hannibal and the Kansas City, Clinton & Springfield, they constitute great trunk lines of railroads, carrying in and through Missouri the commerce of the country, state and interstate, reaching and connecting various commercial centers like Chicago, St. Louis, Kansas City, Omaha, Denver, St. Paul, Memphis, New Orleans, and Galveston. Some of them, like the Atchison, Topeka & Santa Fe and the Chicago, Rock Island & Pacific operate through trans-state trains, running from Chicago to the Pacific Ocean. All operate, in connection with other roads at connecting points and large centers so as to carry all the traffic of the state, freight and passenger, not only that which is state but also that which is interstate, and that which is destined to and from other roads and other states. The interstate business may originate or terminate in the state, or in some instances both these originate and terminate or it may pass through the state with origin and destination both outside thereof. The St. Louis & Hannibal Railway is located wholly within the state, extending from Hannibal, Missouri, through a valuable and populous part of the state, to a point upon the Wabash Railway and is the only one of the complainants, the line of which does not cross the state line. The Kansas City, Clinton & Springfield Railway extends from Olathe, Kansas, (a small town about 20 miles from Kansas City, Missouri), for a distance of about eleven miles to the state line from whence it runs through the southwestern part of the state but not as in
187 the case with the other railways reaching with its own trains any of the basing points or great commercial or market centers of the state.

2. The same properties, trains and facilities are necessarily used by each company, in conducting both the state and interstate business. It would not be practicable to operate in any other way. If separate cars or trains were required to be operated for the state and interstate business or separate facilities used for each, no one of the complainants could for the business of any or all classes in this state pay operating expenses, the public would be greatly inconvenienced, and enormous investments would be required in order to meet changed conditions. It is absolutely essential to the safety, convenience and economy of passengers and shippers for the business to be conducted as it is, without any attempted separation in conducting upon the same trains and with the same facilities both the state and interstate business.

3. Missouri is peculiarly located so far as concerns the question whether the fixing of a state rate directly affects an interstate rate.

The state is midway between the Great Lakes and the Gulf of Mexico, and midway between the Atlantic and Pacific Oceans. The vast quantities of traffic, and volumes of travel between the east and west and north and south necessarily cross the entire state. Two great rivers bound the state upon the east and west. Upon these rivers are located great markets and commercial centers. Those at Kansas City being the largest between the Mississippi River and the Rocky Mountains. All freight rates from the east to the west and vice versa are made up of a rate to and from these rivers plus the rate across the state. This has always been so and whatever the reason therefor, as a practical railway problem will always be so if intelligent, experienced and practical railway men are permitted to fix rates upon a fair, reasonable and intelligent basis. The river points, therefore, have become and are rate basing centers. Great cities and markets have been built up by reason of and upon the faith of this fact. At such points great railroad properties have been acquired and ex-
188 tensive terminals provided in view thereof. In many instances the railways there terminate. If a different method were adopted a chaotic condition would be created, business of these cities and markets would be seriously and unduly disturbed and embarassed and investments there made large- affected. The actual result is that the short line mileage across the state actually controls and fixes the freight rate by every other railway, no matter what the distance or points of origin and destination may be. From Hannibal to St. Joseph, Missouri, is 198 miles by the Chicago, Burlington & Quincy Railway. This is the shortest rail distance between the rivers. From St. Louis to St. Joseph it is at least 300 miles, to Kansas City 280 and upward. Whenever a freight rate per mile is fixed for the 198 miles, the short route between the rivers, the total rate between all Mississippi and Missouri River points must conform thereto, even though the distance be 300 or more miles. This situation applies to every competitive point between the rivers of which there are many of magnitude and importance. The traffic between St. Louis and Missouri river points, both state and interstate, is enormous. Every railway carrying freight must be at the expense of carrying it from 280 to 300 or more miles, yet receive therefor a rate based upon a distance of 198 miles. Unless it should do so it would not be able to handle enough freight between river points to justify the running of trains. Unless the rates were so fixed no substantial business would be done between the river points because every shipper to or from the east would be compelled to ship by the short line. St. Louis merchants could not compete for western business. In the passenger traffic the universal rule is that the short line between any two stations fixes and establishes the rate. In other words, the rate being fixed per mile, the longer route will not be able to carry passengers between any two points if its total rate exceeds the short line rate. In actual railway operation the state line is wholly arbitrary. Unless the mileage rate is the same, passengers will, if the state
189 rate be lower than the interstate, buy tickets or pay fare to a state line station and there provide themselves anew with tickets thus making an interstate journey partly state. Experience

has demonstrated this to be noticeably true. In July and August, 1907, when a two cent fare was in force in Missouri upon state business and three cents upon interstate this practice became quite general. It became absolutely necessary as a practical railroad question to put in force the same rate for state and interstate travel; otherwise it would have become impossible to keep track of a large part of the interstate travel and a large unnecessary expense been incurred by the work imposed at the state line stations. For these and many other reasons shown by the evidence, including those mentioned in paragraph 4, it is a fact that no mileage state rate, for freight or passengers, extending across the state of Missouri, can be established which does not actually and immediately directly affect the interstate rate, not only in but out of the state. It therefore, must as a fact, be said that the rates fixed by the laws complained of in the bills, do directly and immediately affect and regulate interstate commerce.

4. Two of the great trunk lines in Missouri are the Missouri Pacific and the Chicago, Burlington & Quincy Railways. Both extend from St. Louis to St. Joseph,—the Burlington lines between these points are wholly within the state; those of the Missouri Pacific pass out of Missouri at Kansas City, into Kansas, leaving that state at Atchison, coming again into Missouri. All traffic over the Missouri Pacific from St. Louis to St. Joseph is interstate. If the state rate, freight or passenger, be lawfully fixed the Burlington must conform thereto on its St. Louis and St. Joseph business. When it so does this rate must be met by the Missouri Pacific or else the latter will get none of the business. This situation is applicable to all the Missouri Pacific business between St. Joseph and Kansas City and all
190 points east thereof. The Burlington and other roads as direct and as connecting carriers compete therefor. A very large and substantial part of the business of the Missouri Pacific is carried from St. Joseph to Kansas City and St. Joseph and points between and is thus affected. The same situation exists as to other companies. The Chicago Great Western Railway between St. Joseph and Kansas City runs from Missouri, thence into Kansas, and back into Missouri, making the business interstate. The lines of the Burlington and St. Joseph & Grand Island companies between these points are wholly within the state. The lines of the St. Louis & San Francisco and Kansas City Southern companies between Kansas City and Joplin and the great lead and zinc mining districts of Missouri, start from Kansas City, Missouri, extend into Kansas, and thence back into Missouri, thus making the journey interstate. The Missouri Pacific line between these points is wholly state. The Missouri, Kansas & Texas also runs from Missouri into Kansas and back into Missouri, competing with lines wholly in the state. In each of these instances a very large and substantial part of the business of each of said companies originates and terminates in Missouri yet by passing in its journey out of the state is interstate. In each instance if the competing line wholly in the state is by state law compelled to lower its rate, those doing such interstate business must likewise reduce their rates between the same state points or do none of the business. All the complainants have joint tariffs with the others, doing one with the

other, a through connecting business. The laws complained of in the bills do therefore directly affect and interfere with a substantial part of traffic of the state which is interstate commerce originating and ending in the state, particularly much of that kind upon the lines of the Missouri Pacific, Chicago Great Western, St. Louis & San Francisco and Missouri, Kansas & Texas companies. The laws complained of are general in their nature, making neither classification nor exception. So by reason of the peculiar location of many of the large roads in Missouri a unique situation is presented whereby
191 wholly independent of the facts set forth in paragraph 3, state rates certainly directly and immediately affect interstate traffic both freight and passenger. So great an amount of interstate business is affected thereby that if it was permitted to be free from state regulation, and the other companies in the state refused to conform to the rates fixed by the laws by the bills herein questioned, they as competitors, whether original or connecting carriers, would lose so much state business that they would be compelled to carry at an actual loss that which remained of that class of traffic.

5. Much difficulty in the cases has been obviated by complainants making up and delivering to defendants, from time to time, statements showing the earnings and expenses for certain periods, which seem to have been treated by the parties as sufficiently illustrative of the situation to enable a fair determination of the controversy to be had. Complainants have extended to defendants every facility, given them the fullest opportunity, and granted them every possible courtesy, so that any experts for defendant have had every opportunity to call for any figures and to make up any statement upon any theory desired. Inasmuch as the same periods of time, in the various statements submitted, were adopted by both parties, the findings as to each company will follow along the same line, and actually mean that such period should be considered as representative of the situation generally. Inasmuch as the freight act of 1907 covered the same commodities as the Acts of 1905 but allowed an increased earnings, it follows as was conceded by defendants at the trial, if the freight act of 1907 was confiscatory, that of 1905 was likewise confiscatory but to a greater degree. It must therefore be said that the rates fixed by the laws complained of in the bills do, in fact, directly and immediately affect interstate rates and directly regulate a large and substantial part of interstate commerce of the state and interstate carriage, freight and passenger, upon the Missouri Pacific, Chicago & Great Western, St. Louis & San Francisco, Kansas City Southern and Missouri, Kansas & Texas Railways and their connecting carriers.

192 6. The earnings in a state, from state and interstate business, can be ascertained with a reasonable degree of certainty from the way-bills, tickets and cash fares. The books and papers of complainants are and always have been so made and kept that it is a mere matter of expense, though considerable, and detail work, though extensive, to make the ascertainments. The freight earnings consist of earnings from transportation and from miscellaneous services, such as switching, demurrage, storage and track

rentals. Passenger earnings are those from passenger fares and miscellaneous services, such, for instance, as mail, express and excess baggage.

7. No serious difference has arisen in the separate cases as to the ascertainment of the expense of doing the entire passenger, freight or miscellaneous business in the state. So, with a reasonable degree of certainty, and with little controversy, this division can be and has been made. Inasmuch as these expenses are incurred by the use of the same properties, car tracks and facilities, there is not and never has been any certain known fixed rule or method by which, to a mathematical certainty, these different expenses so separated can be divided, as between state and interstate business. The method to be adopted in making the division was the chief serious controversy at the trial. Complainants claim that the division should be upon the revenue basis, in which way there can in the first instance, be assigned to each class of business, freight, miscellaneous freight, passenger and miscellaneous passenger, or to all or any of them combined, a reasonable and fair amount as state and inter-state expenses respectively to which should be added such sum as would represent the extra cost of doing state over interstate business. The defendants claim that the division should be, for freight, upon the ton-mile basis, and for passenger, upon the passenger-mile basis, and that miscellaneous freight earnings and expenses should be included in freight and miscellaneous passenger earnings in those of passenger. As the revenue proportion is, in most instances, nearly twice as much as the ton-mile proportion, the reason
193 for the difference is apparent. By the revenue basis is meant assigning as expense of state business, of any particular kind or kinds, such proportion of the total expense in the state on that class of business as the earnings from that class of state business bears to all the earnings (state and interstate) from the same class; or, as often put, ascertain what proportion all expenses are of all earnings, and then multiply the state earnings of any class thereby, thus finding a sum which would equal the expenses to be there assigned. By the ton-mile basis is meant the assignment to state freight expenses such proportion of all freight expense as the number of tons per mile of state freight bears to the total ton-miles of all freight hauled in the state. By the passenger-mile basis is meant the assignment as state passenger expenses such proportion of all passenger expenses as the number of passengers in state business carried one mile bears to the whole number of passengers (state and interstate) carried one mile.

Another method of division of freight expense is upon the basis of the number of tons carried, regardless of distance. In results there is little difference, as a division on this basis is practically the same as that which is shown by the revenue basis. Neither party has adopted it as a basis of division.

8. There being no method by which the division of expenses as between state and inter-state, can be made to a mathematical certainty, calculations have been made upon every reasonable basis, and a determination reached, in the light of all the evidence, of a

reasonable sum, in money, which should be actually charged as the expense of doing each class of state business. To this should be added the extra cost of doing the state business. The sums hereinafter found were first actually ascertained by a division upon a revenue basis. Then, after considering all things, they were and are adopted as the proper sums to reasonably represent an actual fair apportionment of expenses as between state and inter-state business. Any apportionment of freight expenses, upon a ton-mile basis would charge too small an amount as state expense.
194 This would make necessary the use of a multiple of extra cost, large enough to make the sum total of state freight expense equal that hereinafter accurately found to reasonably represent the cost as it ought from the evidence to be found. Any apportionment of passenger expense, upon the passenger mile or any other basis which would not make the state passenger expense equal in dollars the sum hereinafter found, would be unfair and unjust.

9. All things considered, the evidence duly weighed, there being no abnormal feature, the cost of doing the different classes of state business, ascertained as between state and interstate, upon a revenue basis, brings a result in dollars in Missouri which is fair, just, reasonable and representative. That method of ascertainment is much better and more satisfactory than any other which has, by anyone, been suggested. If the law be that some one theory must be adopted, then the revenue basis would be and is hereby accepted as correct. However, in these cases, although the ascertainment is actually made upon the revenue basis, the figures, when ascertained, have been considered in the light of all the facts and circumstances in evidence, and then in and of themselves and independently of their method of ascertainment, also adopted as fairly and justly representing the cost and expense of doing each class of state business.

10. There is an extra cost and expense of doing state over interstate business, both as to freight and passenger. This extra cost is as to each complainant, for freight, much in excess of fifty per cent, of all freight expense, and for passenger in excess of twenty-five per cent of all passenger expense. While the extra cost is much in excess of these figures, yet, for the purpose of this case, they may, as to each complainant, be adopted as the minimum. How much more the extra cost is, need not be now determined, because at the minimum figures thus fixed, the rates in question are, in view of the case, unreasonable and confiscatory. If the ton-mile method of apportionment of freight expenses were adopted, the mul-
195 tiple of extra cost of doing each class of state business would be fixed as such figures as would make the entire expense as increased, equal to that hereinafter found, because, the total amount as found, regardless of the method of finding same, being that which fairly represents the minimum actual cost and expense of doing such state business.

11. After ascertaining the cost of doing the different classes of state business, and deducting same from the earnings there should be and there is deducted from the state freight earnings of each

complainant such sum as would equal its diminution of earnings *of each complainant such sum as would equal its diminution of earnings* upon the commodities covered by the act, if the rates thereon fixed thereby had been charged. This has been done as to each complainant.

12. In the case of each complainant, other than the St. Louis & Hannibal Railway Company, and Kansas City, Clinton & Springfield Railway Company, the earnings should be sufficient, in any event, to fully meet its proportion of the interest upon the bonded indebtedness, there being nothing out of the ordinary as to such indebtedness, and nothing to indicate that the property was unduly bonded. Such interest has been regularly paid for years and there is nothing to indicate any improper bonding. The proportion of the property assignable to any of the state traffic, upon a revenue basis, is actually worth more than enough to justify such return. The proportions of the property of the St. Louis & Hannibal and the Kansas City, Clinton & Springfield respectively, assignable to any of the state traffic, are worth enough to justify some substantial return. However, irrespective of this finding and eliminating any question of interest, the rates in question are as hereinafter shown insufficient to make a fair and reasonable return upon the value of the portion of the property of each complainant devoted to the use.

196 13. Each class of business of each complainant should have assigned to it its fair proportion of the value of the entire property in the state as that upon which it is entitled to a return. Such a division hereafter made, is upon a revenue basis. The result reached thereby is so fair, just and reasonable that they are, in view of all the facts, adopted, regardless of the method of ascertainment. There has been fixed a minimum valuation for the railway property in the state. The property is worth at least that much. There is and should be assigned to each class of state business such proportion of such valuation as the gross state revenue of that class, bears to the gross revenue in the state. When this is done there is ascertained a sum which, in any event, is, considering all of the evidence, and regardless of the method by which the result is reached, the very least value upon which a reasonable return should be had as to that class of business. These figures, as to values, are probably less than the actual values, but for the purposes of the cases are taken as figures representing a minimum valuation upon which at least a fair return should be had, if any, because the rates in question at such valuation are confiscatory. It is therefore unneccessary to consider how much more the property is worth.

14. There are, therefore, in the cases tried, findings made and hereinafter set forth, showing: (*a*) All earnings, state and interstate, freight, miscellaneous freight, passenger and miscellaneous passenger; the proportions which state and interstate freight and passenger earnings (exclusive of miscellaneous) bear to all combined state and interstate freight and all passenger earnings (including miscellaneous) respectively, and that which they bear to all earnings in the state. (*b*) Miscellaneous freight and miscellane-

ous passenger earnings, (undivided as between state and interstate) with the proportions they are of all earnings and of, respectively, all freight and passenger. (*c*) All expenses, divided in proportion to revenue, as between all kinds of freight and passenger business, including miscellaneous but undivided as between state and interstate. (*d*) A deduction from all state freight (exclusive of
197 miscellaneous), of such proportion of the expenses of all freight and all passenger respectively, as the freight and passenger respectively, exclusive of miscellaneous, bore to all freight and passenger earnings. (*e*) A like deduction of extra cost of doing such business respectively, including miscellaneous. (*f*) A deduction from freight earnings of sums equalling the diminution which would have been caused if the rates fixed by the act had been charged. (*g*) The value of that portion of complainants' property assignable to the particular traffic. This is ascertained by taking, for each class of business, of the entire value in the state such proportion as the earnings upon that portion of the business bear to all the earnings in the state.

The result thus reached and the sums finally ascertained irrespective of the methods by which the apportionments are made, in the light of all the facts and circumstances in evidence, are fair just and reasonable, and such as ought, in each instance, to be fixed. Anything in the way of a return less than six per cent. interest upon the part of the property assignable to any traffic in question is unreasonable and confiscatory.

15. The complainants made out and served their statements upon defendants, not dividing the miscellaneous as between state and interstate, for the reasons therein thus set forth:

"Inasmuch as differences might arise between complainant and the state as to the method of apportioning miscellaneous freight, and mail, express and miscellaneous passenger earnings, and as no question as to such earnings is here involved, same have to avoid confusion and unnecessary controversy, been left undivided as between state and interstate earnings."

No request was ever made for such a division, though it could have been made by complainants had a request been made therefor by defendants. The actual division could have been made by defendants had they so desired. If an accurate division were necessary it would even now be called for, regardless of the time necessary to be devoted to the work, though neither party is entitled to have the case delayed to obtain the information. To do so would
198 make necessary a possible change in some percentages, though not enough to change the result. As neither party thought an actual division was necessary, a court could well assume as the proofs clearly show, that if made, the final result of the case would not be changed thereby. As a matter of fact it would be fairer and better to deal alone with the effect of the laws in question upon strictly freight and passenger business. At the trial, however, the state's experts made an estimated division of these miscellaneous earnings, both freight and passenger, as between state and interstate, by arbitrarily assigning the same in the proportion of the

revenue received from purely freight and purely passenger earnings respectively. This was an arbitrary basis, unwarranted in fact and made in a method which assigned entirely too great a proportion to the state business and improperly and unnecessarily enlarged the state earnings. It is, therefore rejected. From the figures hereinafter set forth, it will be seen that the miscellaneous earnings are but a small proportion of all earnings, especially of the freight. To avoid confusion in making new tabulations, the arbitrary division made by the state's experts may be assumed to be correct, still this would make no difference in the result of the cases. This because there should be charged against these earnings a sum equalling the revenue proportion of all the expenses of freight and passenger respectively, plus an extra cost of doing state business. The sums ascertained in this way would be the fair, just and equitable charge as the minimum expense of doing such business. When so made there should be assigned as the valuation upon which there should be a return, such proportion of the entire value as the respective earnings from miscellaneous freight and passenger, bear to all earnings. When this is done it is apparent that no fair return is received upon this class of business. Hence, if the miscellaneous earnings were added to the freight and passenger earnings respectively, so as to consider all freight as a whole, and also all passenger as a whole, the result reached will not and could not be changed. Had a desire been, in proper time, expressed for an accurate divis-
199 ion of miscellaneous earnings as between state and interstate, according to the facts, it would have been ascertained, so that the loss would have been shown, considering freight and passenger earnings alone, and also such loss considering the miscellaneous with each. However, the miscellaneous passenger business consists in the main of mail and express, and it is difficult to see why, in ascertaining the losses or gains under a two cent fare law there should be included either losses or gains from the miscellaneous earnings, especially when the main portion of the earnings are more in the nature of freight earnings from a passenger service.

16. The expense of doing all the state business, when ascertained on the revenue basis, estimating the extra cost of doing the state freight business at the minimum of at least 50 per cent, and the passenger business at the minimum of at least 25 per cent, shows a sum which would be fair and reasonable to adopt as the cost of doing the entire state business. So that, if all the state business be considered as a whole and be done at the rates now in existence and those fixed by the laws questioned in the bills, there is no doubt that there is no reasonable or compensatory return upon the value of the portion of the property assignable to the whole of the state traffic. It is not here necessary to determine whether, as many competent railroad managers say, that no state rates are compensatory. It is true that such will be the result in Missouri, if the laws in question are enforced. There is a reason why, there, it is true. That state is peculiar in its central location, its class of business, and the location of its cities. The short line between the rivers, as a transportation problem, necessarily fixes the rate for the enormous

freight traffic passing to and from the east and the west. There are located at the two rivers two of the great markets of the United Sates. Freight rates are, by state laws and state commissions, fixed to a large extent upon a mileage basis. The result is that the vast traffic between Kansas City and St. Louis is done at the ex-
200 pense of a carriage of 280 miles and upwards, whereas, the compensation of the carrier is fixed upon the theory of a carriage of 198 miles. So with the passenger business. There are many large centers upon each side of the state, particularly the great cities, St. Louis, Kansas City and St. Joseph. There are many large competitive cities in the interior. There are great and marked differences in the respective distances between competitive points on the many different lines in the state. As passenger rates are fixed by law upon the mileage basis the necessary result is that every company has numerous instances in which it is put to the expense of a carriage of a long distance but is paid at a rate for a much shorter distance. Taking these facts into consideration, together with the extra cost of doing state business, it is a fact, whether all state business be treated as a whole or subdivided into classes, the rates now in existence and those fixed by the laws in question, fail to bring any fair or substantial return; nothing like one-half of the rate of interest which is fixed by law.

17. The adoption of the two cent fare did not cause any substantial increase in travel. At first a great many persons rode as state passengers to and from the state line, so that the state obtained more revenue than that to which it was entitled. Any statement of the passenger business which includes July and August, 1907, is unduly fair to the state. However, state and interstate fares soon became the same, and the longer the period over which the figures are extended the greater will be the loss shown.

18. If the companies had, after the two-cent passenger rate went into effect, been permitted to charge the amount which they, prior thereto, actually received per passenger per mile, they would have received this much more money:

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Name of road.	Period covered, months.	From State passengers.	From Interstate passengers.
St. L. & S. F. R. R. Co.....	12	666,008.72	509,738.63
A. T. & S. F. Ry. Co.....	12	30,885.52	66,271.03
C. R. I. & P. Ry. Co. and St. L. K. C. & C. Ry. Co.....	12	124,469.14	111,178.60
K. C. So. Ry. Co.....	12	7,044.49	27,260.75
St. L. & H. Ry. Co.....	12	37,275.38	145.23
M. K. & T. Ry. Co.....	12	140,593.46	63,815.12
K. C. C. & S. Ry. Co.....	12	14,654.57	10,846.91
C. B. & Q. R. R. Co.....	12	394,878.77	261,556.41
C. G. W. Ry. Co.....	12	65,945.96	46,162.17

19. In the case of the St. Louis & San Francisco Railway there were included in the expenses sums paid as rentals under a lease of the Kansas City, Fort Scott & Memphis Railway. The common

stock of the latter company is owned by the St. Louis & San Francisco, which operates the property under a lease, requiring it to pay to the holders of preferred stock of the Memphis as a rental a sum equal to a four per cent annual dividend thereon. There is nothing to impeach the fairness of the lease or its terms. It has been in existence for years. This rental has always been treated as an operating expense and not included in the fixed charges, nor included in the stock issue or bonded indebtedness or interest charge. It is therefore treated as it should be and in fact is, part of the expenses. The total amount charged in the accounts hereinafter set forth as part of the state freight expense is $8,428.56 and as part of the state passenger expense $7,443.68. If these items should be eliminated from the expenses, there would be no difference in the result.

20. The minimum values of the railway properties in the state belonging to and used by the complainants in Missouri are:

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	Miles.	Value.	Value per mile.
St. Louis and San Francisco (1907)	1688.89	61,238,414.70	36,259.00
Atchison, Topeka & Santa Fe (1907)	348.31	15,091,212.00	43,326.00
Chicago, Rock Island & Pacific (1907)	515.48	19,102,507.59	37,058.00
Kansas City Southern (1908)	174.48	8,039,084.40	46,075.00
St. Louis & Hannibal (1907)	120.61	1,143,007.02	9,477.00
Missouri, Kansas & Texas (1908)	506.21	20,894,229.93	41,276.00
Chicago Burlington & Quincy (1908)	1136.34	53,172,907.83	46,793.00
Kansas City Clinton & Springfield (1907)	151.01	2,380,222.48	15,762.00
Chicago Great Western (1907)	84.43	3,605,236.38	42,701.00

The sums thus found as the minimum values in all cases except those of the Kansas City, Clinton & Springfield and St. Louis & Hannibal, are in fact the same as estimated by the assessing officers of Missouri. In the cases of those two companies it is one third less. Nevertheless the valuations thus found are, aside from and independently of the fact that they were estimates of the state, found in view of all the facts and circumstances in evidence to be the minimum fair and reasonable values of the properties.

21. There are now made and submitted, tables showing the earnings and expenses and assignable fixed charges and value of the complainants' property in the cases tried. From the expenses, even taxes and rentals are excluded, though probably they should not be. The periods over which the findings extend were, at the trial, adopted by the parties as fairly representative. They are in fact sufficiently fairly representative of the actual earnings and expenses, under ordinary and usual conditions, to be used as tests to determine whether the rates permit of a reasonable return upon the investment. They were supported by statements covering other years and longer periods.

These tables treat state freight as distinct from miscellaneous freight, and state passenger as distinct from miscellaneous
203 passenger, but do not charge against either freight or passenger earnings any expense of doing miscellaneous business, nor do they include in the assignable proportion of value or interest any part of that assignable to the miscellaneous business. Nor do these tables include the St. Louis Southwestern, Missouri Pacific, St. Louis, Iron Mountain & Southern, Quincy, Omaha & Kansas City, Wabash, St. Joseph & Grand Island, Chicago, Milwaukee & St. Paul, or Chicago & Alton Railways. This because the cases of these companies, by stipulations, are to abide the result in other cases as to which findings are made. These tabulations contain the figures agreed upon by the experts for both sides if the court should adopt the results reached by a revenue basis.

(A) St. Louis and San Francisco R. R. Company.

(1) Period Covered.

The representative period taken by the experts upon both sides as to this company *are* for three months ending September 30th, 1907, and in that period the earnings and expenses were as set forth in subdivisions (1) and (2).

(2) Earnings and Percentages.

Character.	Amount.	Per cent of all freight earnings.	Per cent of all earnings.
Interstate freight	$2,214,002.82	76.94	54.68
State freight	577,192.84	20.04	14.26
Miscellaneous freight	86,814.57	3.02	2.14
Total	2,878,010.23	100.	71.08
		Per cent of all passenger earnings.	
Interstate passenger	368,687.43	31.49	9.11
State passenger	599,051.59	51.17	14.79
Miscellaneous passenger	203,077.28	17.34	5.02
Total	1,170,816.30	100.	28.92
Grand Total	4,048,826.53	.....	100.

204 (3) Expenses, Less Taxes & Rentals, Undivided Between State and Interstate.

All freight expense, including miscellaneous	$1,802,813.26
All passenger expense including miscellaneous	974,816.61

	Freight.	Passenger.
Percentage of expenses to earnings	62.64%	83.26%

(4) Taxes and Rentals.

Freight	$112,452.04
Passenger	38,979.63
Total	151,431.67

(5) State Earnings and Expenses.

	Freight.	Passenger.
State earnings above shown are	577,192.84	599,051.59
Expense of state business	361,644.33	498,716.20
Leaving	215,548.51	100,335.39
Less Taxes & Rentals (Par. 4)	22,760.29	20,097.90
Leaving	192,788.22	80,237.49
Deduct extra cost of state business freight estimated at 50%, passenger 25%	131,425.08	53,907.36
Leaving	61,363.14	26,330.13
Deduct diminution in earnings if the state freight rates in question had been charged	11,389.27	.....
Leaving as surplus	49,973.87	26,330.13

(6) Valuation.

Valuation of property in state is $61,238,414.70 of which 14.26% is assignable to state freight and 14.79% to state passenger business	2,183,149.48	2,264,290.38
Six per cent upon this part for the period covered is	130,988.97	135,857.42

(7) Return on Value.

In the way of a return upon the assignable value found in subdivision 6, the surplus shown in subdivision 5, is	2.29%	1.16%

(8) Interest Charge.

The actual interest charge paid, divided in the assignable proportions shown in subdivision 6 is	$116,792.45	$121,133.27

205 (B) ATCHISON, TOPEKA & SANTA FE R. R. COMPANY.

(1) Period Covered.

The representative period taken by the experts upon both sides as to this company *are* for six months ending Dec. 31, 1907, and in that period the earnings and expenses were as set forth in subdivisions (1) and (2).

(2) Earnings and Percentages.

Character.	Amount.	Per cent of all freight earnings.	Per cent of all earnings.
Interstate freight.....	1,872,915.00	90.05	67.72
State freight.....	141,133.00	6.79	5.10
Miscellaneous freight.....	65,833.56	3.16	2.38
Total.....	2,079,881.56	100.	75.20
		Per cent of all passenger earnings.	
Interstate passenger.....	355,318.12	51.81	12.85
State passenger.....	104,370.19	15.22	3.77
Miscellaneous passenger....	226,080.00	32.97	8.18
Total.....	685,768.31	100.	24.80
Grand Total.....	2,765,649.87	.....	100.

(3) Expenses, Less Taxes & Rentals, Undivided Between State and Interstate.

All freight expense including miscellaneous.....	1,382,738.65
All passenger expense, including miscellaneous.....	572,167.20

	Freight.	Passenger.
Percentage of expenses to earnings.....	66.48%	83.43%

206 (4) Taxes & Rentals.

Freight	32,361.50
Passenger	10,854.04
Total.....	43,215.54

(5) State Earnings and Expenses.

	Freight.	Passenger.
State earnings above (par. 2) shown are	141,133.00	104,370.19
Expense of state business	92,581.89	87,834.09
Leaving	48,551.11	16,536.10
Less Taxes & Rental	3,503.41	901.74
Leaving	45,047.70	15,634.36
Deduct extra cost of state business freight estimated at 50%, passenger 25%	41,859.55	17,947.71
Leaving	3,188.15	Def. 2,313.35
Deduct diminution in earnings if the state freight rates in question had been charged	13,885.87	.....
Leaving	Def. 10,697.72	Def. 2,313.35

(6) Valuation.

Valuation of property in state is $15,091,212.00, of which 5.10% is assignable to state freight, and 3.77% to state passenger business	384,825.91	284,469.35
Six per cent upon this part for the period covered is	23,089.35	17,068.16

(7) Return on Value.

In the way of a return upon the assignable value found in subdivision 6, the deficit shown in subdivision 5 is	Nothing %	Nothing %

(8) Interest Charge.

The actual interest charge paid, divided in the assignable proportions shown in subdivision 6 is	17,934.56	13,257.51

207 (C) CHICAGO, ROCK ISLAND & PACIFIC RY. COMPANY.

(1) Period Covered.

The representative period taken by the experts upon both sides as to this company *are* for three months ending September 30, 1907, and in that period the earnings and expenses were as set forth in subdivisions (1) and (2).

(2) Earnings and Percentages.

Character.	Amount.	Per cent of all freight earnings.	Per cent of all earnings.
Interstate freight	$665,228.16	79.38	59.86
State freight	150,953.68	18.02	13.58
Miscellaneous freight	21,815.70	2.60	1.96
Total	$837,997.54	100.	75.40
		Per cent of all passenger earnings.	
Interstate passenger	$113,524.21	41.53	10.22
State passenger	114,853.04	42.02	10.33
Miscellaneous passenger	44,980.08	16.45	4.05
Total	$273,357.33	100.	24.60
Grand Total	1,111,354.87	.....	100.00

(3) Expenses, Less Taxes and Rentals, Undivided Between State and Interstate.

All freight expense, including miscellaneous	$619,199.73
All passenger expense, including miscellaneous	317,633.62

	Freight.	Passenger.
Percentages of expenses to earnings	73.89%	116.20%

208 (4) Taxes and Rentals.

Freight	$74,227.43
Passenger	21,015.44
Total	$95,242.87

(5) State Earnings and Expenses.

	Freight.	Passenger.
State earnings above (par. 2) shown are	$150,953.68	$114,853.04
Expense of state business	111,579.80	133,469.65
Leaving	$39,373.88	Def. 18.616.61
Less taxes and rentals	13,375.78	8,830.68
Leaving	$25,998.10	Def. 27,447.29
Deduct extra cost of state business freight estimated at 50%, passenger 25%	$41,919.82	17,501.61
Leaving	Def.$15,921.72	Def. 44,948.90
Deduct diminution in earnings if the state freight rates in question had been charged	$9,989.43	.....
Leaving	Def.$25,911.15	Def. 44,948.90

(6) Valuation.

Valuation of property in state is $19,102,507.59, of which 13.58% is assignable to state freight and 10.33% to state passenger business..	$648,530.15	$493,322.26
Six per cent upon this part for the period covered is.....	$38,911.81	$29,599.34

(7) Return on Value.

In the way of a return upon the assignable value found in subdivision 6, the deficit shown in subdivision 5 is.....	Nothing %	Nothing %

(8) Interest Charge.

The actual interest charge paid, divided in the assignable proportions shown in subdivision 6, is	$24,907.02	$18,946.21

209 (D) KANSAS CITY SOUTHERN RAILWAY COMPANY.

(1) Period Covered.

The representative period taken by the experts upon both sides as to this Company *are* for six months ending June 30, 1908, and in that period the earnings and expenses were as set forth in subdivisions (1) and (2).

(2) Earnings and Percentages.

Character.	Amount.	Per cent of all freight earnings.	Per cent of all earnings.
Interstate freight	$702,249.91	79.35	67.11
State freight	38,748.76	4.38	3.70
Miscellaneous freight	144,046.62	16.27	13.77
Total.....	$885,045.29	100.	84.58
		Per cent of all passenger earnings.	
Interstate passenger	$89,504.58	55.47	8.55
State passenger	31,865.28	19.75	3.05
Miscellaneous passenger	39,973.54	24.78	3.82
Total.....	$161,343.40	100.	15.42
Grand Total.....	$1,046,388.69	.....	100.00

(3) Expenses, Less Taxes and Rentals, Undivided Between State and Interstate.

All freight expense, including miscellaneous	$571,297.54
All passenger expense, including miscellaneous	141,432.56

	Freight.	Passenger.
Percentages of expenses to earnings	64.55%	87.66%

210 (4) Taxes and Rentals.

Freight	$22,331.70
Passenger	3,737.37
Total	$26,069.07

(5) State Earnings and Expenses.

	Freight.	Passenger.
State earnings above (par. 2) shown are	$38,748.76	$31,865.28
Expense of state business	25,022.83	27,932.93
Leaving	$13,725.93	3,932.35
Less taxes and rentals	978.13	738.13
Leaving	$12,747.80	3,194.22
Deduct extra cost of state business freight estimated at 50%, passenger 25%	11,711.60	5,346.15
Leaving	$1,036.20	Def. 2,151.93
Deduct diminution in earnings if the state freight rate in question had been charged	2,957.58	.....
Leaving	Def. $1,921.38	Def. $2,151.93

(6) Valuation.

Valuation of property in state is $8,039,084.40, of which 3.70% is assignable to state freight, and 3.05% to state passenger business	$148,723.06	$122,596.04
Six per cent upon this part for the period covered is	$8,923.38	7,355.76

(7) Return on Value.

In the way of a return upon the assignable value found in subdivision 6, the deficit shown in subdivision 5 is	Nothing %	Nothing %

(8) Interest Charge.

The actual interest charge paid, divided in the assignable proportions shown in subdivision 6, is	$5,295.38	$4,365.11

211 (E) ST. LOUIS & HANNIBAL RAILWAY COMPANY.

(1) Period Covered.

The representative period taken by the experts upon both sides as to this company *are* for the year ending June 30, 1908, and in that period the earnings and expenses were as set forth in subdivisions (1) and (2).

(2) Earnings and Percentages.

Character.	Amount.	Per cent of all freight earnings.	Per cent of all earnings.
Interstate freight	$51,735.05	36.25	24.61
State freight	87,941.99	61.62	41.84
Miscellaneous freight	3,044.11	2.13	1.45
Total	$142,721.15	100.	67.90
		Per cent of all passenger earnings.	
Interstate passenger	$198.19	0.29	0.09
State passenger	52,667.38	78.04	25.05
Miscellaneous passenger	14,619.99	21.67	6.96
Total	$67,485.56	100.	32.10
Grand Total	210,206.71	.....	100.

(3) Expenses, Less Taxes and Rentals, Undivided Between State and Interstate.

All freight expense, including miscellaneous	$117,908.81
All passenger expense, including miscellaneous	68,343.04

	Freight.	Passenger.
Percentages of expenses to earnings	82.61%	101.27%

212 (4) Taxes and Rentals.

Freight	$5,994.07
Passenger	2,273.61
Total	$8,267.68

(5) State Earnings and Expenses.

	Freight.	Passenger.
State earnings above (par. 2) shown are	$87,941.99	$52,667.38
Expense of state business	72,655.40	53,334.91
Leaving	$15,286.59	Def. 667.53
Less taxes and rentals	3,693.55	1,774.32
Leaving	$11,593.04	Def. 2,441.85
Deduct extra cost of state business freight estimated at 50%, passenger 25%	12,026.69	2,444.68
Leaving	Def. $433.65	Def. 4,886.53
Deduct diminution in earnings if the state freight rates in question had been charged	15,126.02	.....
Leaving	Def. $15,559.67	Def. 4,886.53

(6) Valuation.

Valuation of property in state is $1,143,007.02, of which 41,84% is assignable to state freight, and 25.05% to state passenger business	$478,234.14	$286,323.26
Six per cent upon this part for the period covered is	28,694.05	17,179.40

(7) Return on Value.

In the way of a return upon the assignable value found in subdivision 6, the deficit shown in subdivision 5 is	Nothing %	Nothing %

(8) Interest Charge.

The actual interest charge paid, divided in the assignable proportions shown in subdivision 6, is	$16,359.44	$9,794.55

213 (F) MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY.

(1) Period Covered.

The representative period taken by the experts upon both sides as to this company *are* for July, August, October, November and December, 1907, and January, 1908, and in that period the earnings and expenses were as set forth in subdivisions (1) and (2).

(2) Earnings and Percentages.

Character.	Amount.	Per cent of all freight earnings.	Per cent of all earnings.
Interstate freight	$1,333,455.26	81.73	57.89
State freight	277,416.52	17.01	12.04
Miscellaneous freight	20,603.37	1.26	0.89
Total	$1,631,475.15	100.	70.82
		Per cent of all passenger earnings.	
Interstate passenger	$303,214.54	45.12	13.16
State passenger	246,368.53	36.66	10.70
Miscellaneous passenger	122,458.22	18.22	5.32
Total	$672,041.29	100.	29.18
Grand Total	2,303,516.44	.....	100.00

(3) Expenses, Less Taxes and Rentals, Undivided Between State and Interstate.

All freight expense, including miscellaneous	$1,010,643.65
All passenger expense, including miscellaneous	516,589.98

	Freight.	Passenger.
Percentages of expense to earnings	61.95%	76.87%

214 (4) Taxes and Rentals.

Freight	$119,017.87
Passenger	58,465.49
Total	$177,483.36

(5) State Earnings and Expenses.

	Freight.	Passenger.
State earnings above (par. 2) shown are	$277,416.52	$246,368.53
Expenses of state business	$171,910.48	$189,381.89
Leaving	$105,506.04	$56,986.64
Less taxes and rentals	$20,244.94	$21,433.45
Leaving	$85,261.10	$35,553.19

Deduct extra cost of state business freight estimated at 50%, passenger 25%	$66,590.77	$27,482.59
Leaving	$18,670.33	$8,070.60
Deduct diminution in earnings if the state freight rates in question had been charged	$20,222.85	.....
Leaving as surplus	Def. $1,552.52	$8,070.60

(6) Valuation.

Valuation of property in state is $20,894,229.93 of which 12.04% is assignable to state freight and 10.70% to state passenger business	$1,257,832.64	1,117,841.30
Six per cent upon this part for the period covered is	$75,469.96	67,070.48

(7) Return on Value.

In the way of a return upon the assignable value found in subdivision 6, the surplus shown in subdivision 5 is	Nothing %	0.72%

(8) Interest Charge.

The actual interest charge paid, divided in the assignable proportions shown in subdivision 6, is	$62,439.68	$55,490.41

215 (G) CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

(1) Period Covered.

The representative period taken by the experts upon both sides as to this company *are* for the year ending June 30, 1908, and in that period the earnings and expenses were as set forth in subdivisions (1) and (2).

(2) Earnings and Percentages.

Character.	Amount.	Per cent of all freight earnings.	Per cent of all earnings.
Interstate freight	$6,454,699.87	78.75	52.40
State freight	$1,580,529.64	19.28	12.83
Miscellaneous freight	$161,579.41	1.97	1.31
Total	$8,196,608.92	100.	66.54

		Per cent of all passenger earnings.	
Interstate passenger	$1,777,788.27	43.15	14.43
State passenger	$1,611,702.92	39.11	13.09
Miscellaneous passenger ...	$731,021.89	17.74	5.94
Total.....	$4,120,513.08	100.	33.46
Grand Total.....$12,317,122.00		.....	100.

(3) Expenses (Less Taxes and Rentals), Undivided Between State and Interstate.

All freight expense, including miscellaneous.....	$6,793,610.60
All passenger expense, including miscellaneous.....	3,527,311.81

	Freight.	Passenger.
Percentages of expenses to earnings.....	82.88	85.60

216 (4) Taxes and Rentals.

Freight	Cr.	$12,235.30
Passenger	Cr.	6,152.58
Total.....	Cr.	$18,387.88

(5) State Earnings and Expenses.

	Freight.	Passenger.
State earnings above (par. 2) shown are.....	$1,580,529.64	$1,611,702.92
Expense of state business.....	1,324,453.83	1,489,746.71
Leaving.....	$256,075.81	$121,956.21
Less taxes and rentals.....	Cr. 2,487.99	2,798.50
Leaving.....	$258,563.80	$124,754.71
Deduct extra cost of state business freight estimated at 50%, passenger 25%.....	484,129.29	158,205.70
Leaving.....	Def. $225,565.49	Def. $33,450.99
Deduct diminution in earnings if the state freight rates in question had been charged..	112,533.71	.....
Leaving.....	Def. $338,099.20	Def. $33,450.99

(6) Valuation.

Valuation of property in state is $53,172,907.83, of which 12.83% is assignable to state freight, and 13.09% to state passenger business.	$6,822,084.07	$6,960,333.63
Six per cent upon this part for the period covered is.....	409,325.04	417,620.02

(7) Return on Value.

In the way of a return upon the assignable value found in subdivision 6, the deficit shown in subdivision 5 is.....	Nothing %	Nothing %

217 (H) KANSAS CITY, CLINTON & SPRINGFIELD RY. COMPANY.

(1) Period Covered.

The representative period taken by the experts upon both sides as to this company *are* for the year ending June 30th, 1908, and in that period the earnings and expenses were as set forth in subdivisions (1) and (2).

(2) Earnings and Percentages.

Character.	Amount.	Per cent of all freight earnings.	Per cent of all earnings.
Interstate freight.....	$116,893.60	68.27	41.04
State freight.....	45,003.15	26.29	15.80
Miscellaneous freight.....	9,319.58	5.44	3.27
Total.....	$171,216.33	100.	60.11
		Per cent of all passenger earnings.	
Interstate passenger	$41,145.00	36.22	14.45
State passenger	47,646.80	41.95	16.73
Miscellaneous passenger	24,797.39	21.83	8.71
Total.....	$113,589.19	100.	39.89
Grand Total.....	$284,805.52	.....	100.

(3) Expenses (Less Taxes & Rental) Undivided Between State and Interstate.

All freight expense, including miscellaneous.....	$98,988.29
All passenger expense, including miscellaneous.....	$138,384.77

	Freight.	Passenger.
Percentages of expenses to earnings.....	57.81%	121.83

218 (4) Taxes and Rentals.

Freight	$9,182.36
Passenger	5,749.38
Total	$14,931.74

(5) State Earnings and Expenses.

	Freight.	Passenger.
State earnings above (par. 2) shown are	$45,003.15	$47,646.80
Expense of state business	26,024.02	58,052.41
Leaving	$18,979.13	Def. $10,405.61
Less taxes and rentals	2,414.04	2,411.86
Leaving	$16,565.09	Def. $12,817.47
Deduct extra cost of state business freight estimated at 50%, passenger 25%	8,483.30	4,760.44
Leaving	$8,081.79	Def. $17,577.91
Deduct diminution in earnings if the state freight rates in question had been charged	2,970.21	.....
Leaving	$5,111.58	Def. $17,577.91

(6) Valuation.

Valuation of property in state is $2,380,222.48, of which 15.80% is assignable to state freight, and 16.73% to state passenger business	$376,075.15	$398,211.22
Six per cent upon this part for the period covered is	$22,564.51	$23,892.67

(7) Return of Value.

In the way of a return upon the assignable value found in subdivision 6, the surplus shown in subdivision 5 is	1.36%	Nothing %

(8) Interest Charge.

The actual interest charge paid, divided in the assignable proportions shown in subdivision 5, is	$23,581.78	$25,287.48

219 (I) CHICAGO GREAT WESTERN RAILWAY COMPANY.

(1) Period Covered.

The representative period taken by the experts upon both sides as to this company *are* for six months, ending Dec. 31, 1907, and in that period the earnings and expenses were as set forth in subdivisions (1) and (2).

(2) Earnings and Percentages.

Character.	Amount.	Per cent of all freight earnings.	Per cent of all earnings.
Interstate freight	$224,169.58	86.02	57.39
State freight	29,129.36	11.18	7.45
Miscellaneous freight	7,280.24	2.80	1.86
Total	$260,579.18	100.	66.70
		Per cent of all passenger earnings.	
Interstate passenger	$72,360.87	55.62	18.53
State passenger	38,105.03	29.28	9.75
Miscellaneous passenger	19,643.99	15.10	5.02
Total	$130,109.89	100.	33.30
Grand Total	$390,689.07	.....	100.

(3) Expenses (Less Taxes and Rentals) Undivided Between State and Interstate.

All freight expense, including miscellaneous	$198,887.69
All passenger expense, including miscellaneous	126,355.88

	Freight.	Passenger.
Percentages of expenses to earnings	76.33%	97.11%

220 (4) Taxes and Rentals.

Freight	$12,294.18
Passenger	11,312.16
Total	$23,606.34

(5) State Earnings and Expenses.

	Freight.	Passenger.
State earnings above (par. 2) shown are	$29,129.36	$38,105.03
Expenses of state business	22,235.64	36,996.98
Leaving	$6,893.72	$1,108.05
Less taxes and rentals	1,374.49	3,312.25
Leaving	$5,519.23	Def. $2,204.20
Deduct extra cost of state business freight estimated at 50%, passenger 25%	$9,347.72	6,090.35
Leaving	Def. $3,828.49	Def. $8,294.55
Deduct diminution in earnings if the state freight rates in question had been charged	1,893.41	.....
Leaving	Def. $5,721.90	Def. $8,294.55

(6) Valuation.

Valuation of property in state is $3,605,236.38, of which 7.45% is assignable to state freight, and 9.75% to state passenger business	$134,295.06	$175,755.27
Six per cent upon this part for the period covered is	$8,057.70	$10,545.32

(7) Return of Value.

In the way of a return upon the assignable value found in subdivision 6, the surplus shown in subdivision 5 is	.....%	.....%

(8) Interest Charge.

The actual interest charge paid, divided in the assignable proportions shown in subdivision 6, is	$7,164.08	$9,375.81

221 22. If it should be assumed that the state experts correctly divided miscellaneous earnings as between state and interstate, which they did not do, still the fair and reasonable sum to be charged against the state part of these miscellaneous freight and passenger earnings is the revenue proportion of the entire freight and passenger expense plus a minimum extra cost for miscellaneous freight and for miscellaneous passenger. When this is done it clearly appears that even without an allowance for extra cost, the result could not

be changed if the findings already made as to state freight and passenger had included the miscellaneous, or had the miscellaneous of each class been separately considered. In no case would there be any fair return. If miscellaneous were considered separately, or if considered with freight and passenger respectively, the result would not be effected. This clearly appears from a tabulation now made as to each company with the exception of the St. Louis and Hannibal Ry. Company and the Kansas City, Clinton and Springfield Ry. Co., which are omitted for the reason that the State compiled and submitted no figures for these roads, showing: (*a*) The state experts' division of miscellaneous, though in fact it is too favorable to the state. (*b*) A deduction from earnings of the percentage proportion of expenses to earnings as done in Smyth v. Ames, 169 U. S. 466, which is the same as the revenue basis. (*c*) The minimum extra cost now found of doing the state over interstate being a mere fraction less than, and practically the same as, found as to the strictly freight and passenger. (*d*) The proportion that state's part of the miscellaneous was of all earnings, and the amount of return to which the company was entitled at six per cent interest upon that proportion of the value of the entire property as hereinbefore and now found to be fair, reasonable and just.

222 (1) St. Louis and San Francisco Railroad Company.

	Freight.			Passenger.		
	Amount.	% of all freight.	% of all earnings.	Amount.	% of all pass.	% of all earnings.
Miscellaneous state earnings	$17,953.25	00.62	00.44	$125,704.84	10.74	3.10
Less revenue proportion of expense 00.62% freight and 10.74% passenger	$11,177.44			$104,695.30		
Leaving	$6,775.81			$21,009.54		
Less increased cost freight 50%, passenger 25%	$5,588.72			$22,713.23		
Leaving	$1,187.09			Def. $1,703.69		
Less Taxes and Rentals	$697.20			$4,186.41		
	$489.89			Def. $5,890.10		
Amount due at 6% interest on portion of value assignable to the state part of the traffic	$4,041.74			$28,475.86		
Total Deficit..	$3,551.85			$34,365.96		

223 (2) Atchison, Topeka and Santa Fe Railway Company.

	Freight.			Passenger.		
	Amount.	% of all freight.	% of all earnings.	Amount.	% of all pass.	% of all earnings.
Miscellaneous state earnings	$4,608.35	00.22	00.17	$51,320.16	7.48	1.86
Less revenue proportion of expense 00.22% of freight and 7.48% passenger.	$3,042.02			$42,798.11		
Leaving	$1,566.33			$8,522.05		
Less increased cost freight 50%, passenger 25%.....	$1,521.01			$9,726.84		
Leaving	45.32		Def.	1,204.79		
Less Taxes and rentals	71.20			811.88		
Def..	25.88		Def.	2,016.67		
Amount due at 6% interest on portion of value assignable to the state part of the traffic	$769.65			$8,420.90		
Total deficit...	$795.53			$10,437.57		

224 (3) Chicago, Rock Island and Pacific Railway Company.

	Freight.			Passenger.		
	Amount.	% of all freight.	% of all earnings.	Amount.	% of all pass.	% of all earnings.
Miscellaneous state earnings	$4,035.91	00.48	00.36	$22,620.48	8.28	2.04
Less revenue proportion of expense 00.48% of freight and 8.28% passenger.	$2,966.88			$26,300.06		
Leaving	$1,069.03		Def.	$3,679.58		
Less increased cost freight 50%, passenger 25%	$1,483.44			$5,907.98		
Leaving ..Def.	$414.41		Def.	$9,587.56		
Less Taxes and Rentals	356.29			1,740.08		
Def.	$770.70		Def.	$11,327.64		
Amount due at 6% interest on portion of value assignable to the state part of the traffic	$1,031.54			$5,845.37		
Total deficit...	$1,802.24			$17,173.01		

225 (4) Kansas City Southern Railway Company.

	Freight.			Passenger.		
	Amount.	% of all freight.	% of all earnings.	Amount.	% of all pass.	% of all earnings.
Miscellaneous state earnings	$7,533.64	00.85	00.72	$10,493.05	6.50	1.00
Less revenue proportion of expense 00.85% freight and 6.50% passenger.	$4,856.03			$9,193.12		
Leaving	$2,677.61			$1,299.93		
Less increased cost freight 50%, passenger 25%	$2,428.02			$2,107.35		
Leaving	249.59		Def.	807.42		
Less taxes and Rentals	$189.82			242.93		
	59.77		Def.	$1,050.35		
Amount due at 6% interest on portion of value assignable to the state part of the traffic	$1,736.44			$2,411.73		
Total deficit ..	$1,676.67			$3,462.08		

226 (5) Missouri, Kansas and Texas Railway Company.

	Freight.			Passenger.		
	Amount.	% of all freight.	% of all earnings.	Amount.	% of all pass.	% of all earnings.
Miscellaneous state earnings	$3,547.90	00.22	00.15	$54,885.77	8.17	2.38
Less revenue proportion of expense 00.22% freight and 8.17% passenger.	$2,223.42			$42,205.40		
Leaving	$1,324.48			$12,680.37		
Less increased cost freight 50%, passenger 25%	$1,111.71			$9,505.26		
Leaving	212.77			$3,175.11		
Less taxes and Rentals	261.84			$4,776.63		
Def.	49.07		Def.	$1,601.52		
Amount due at 6% interest on portion of value assignable to the state part of the traffic	$940.24			$14,918.48		
Total deficit ..	$989.31			$16,520.00		

227 (6) Chicago, Burlington and Quincy Railroad Company.

	Freight.			Passenger.		
	Amount.	% of all freight.	% of all earnings.	Amount.	% of all pass.	% of all earnings.
Miscellaneous state earnings	$31,743.33	00.39	00.26	$347,600.91	8.44	2.82
Less revenue proportion of expense 00.39% freight and 8.44% passenger.	$26,495.08			$297,705.12		
Leaving	$5,248.25			$49,895.79		
Less increased cost freight 50%, passenger 25%	$13,247.54			$66,666.19		
Leaving ..Def.	7,999.29			Def. 16,770.40		
Less Taxes and Rentals .....Cr.	47.72			Cr. 519.28		
Def.	$7,951.57			Def. $16,251.12		
Amount due at 6% interest on portion of value assignable to the state part of the traffic	$8,294.97			$89,968.56		
Total deficit ..	$16,246.54			$106,219.68		

228 (7) Chicago Great Western Railway Company.

	Freight.			Passenger.		
	Amount.	% of all freight.	% of all earnings.	Amount.	% of all pass.	% of all earnings.
Miscellaneous state earnings	$837.23	00.32	00.21	$6,777.18	5.21	1.73
Less revenue proportion of expense 00.32% freight, and 5.21% passenger.	$636.44			$6,583.14		
Leaving	$200.79			$194.04		
Less increased cost freight 50%, passenger 25%	$318.22			$1,541.54		
Leaving ..Def.	117.43			Def. $1,347.50		
Less taxes and Rentals	39.34			589.36		
Def.	$156.77			Def. $1,936.86		
Amount due at 6% interest on portion of value assignable to the state part of the traffic	$227.13			$1,871.12		
Total deficit...	$363.90			$3,807.98		

229 23. If the commodities affected by the Freight Act of 1907 are alone considered, irrespective of and separate from the earnings from other freight, the rates are plainly confiscatory, and not only fail to bring any return upon the portion of the property devoted to such use, but do not enable any complainant to meet operating expenses. The following tables are in this respect submitted as findings of the earnings of and expenses fairly chargeable to these commodities for a period which is representative.

(1) St. Louis & San Francisco.

For the three months representative period the result is:

The gross earnings upon the commodities affected by the Freight Act of 1907, for three months, are $56,699.26, or $226,797.04 for the year, which is 10.94% of all state freight earnings. Applying this to the state freight statement, there is the result:

All earnings from this class of state freight were for 3 months	$56,699.26
All state freight expenses were $382,405.32 for three months, and 10.94% thereof chargeable to these commodities	41,835.14
	$14,864.12
Diminution if the rates fixed by the Act of 1907 had been charged	11,389.27
	$3,474.85
10.94% of Extra cost at 50%, $130,246.94	$14,249.02
10.94% of Interest, $117,775.28	12,884.62
10.94% of Valuation, $132,091.26	14,450.78

230 (2) Atchison, Topeka & Santa Fe.

The gross earnings upon the commodities affected by the Freight Act of 1907, for six months are $47,137.00, or $94,274.00 for the year, which is 33.4% of all state freight earnings. Applying this to the findings as to state freight, there is this result:

All earnings from this class of state freight were for six months	$47,137.00
All state freight expenses were $96,085.30 and 33.4% thereof chargeable to these commodities	32,092.49
Leaving	$15,044.51
Diminution if the rates fixed by the Act of 1907 had been charged	$13,885.87
	$1,158.64
33.4% of Extra cost at 50%, $43,443.57	$14,510.15
33.4% of Interest, $17,934.56	5,990.14
33.4% of Valuation, $23,089.55	7,711.91

(3) Chicago, Rock Island & Pacific.

For the three months representative period July, August and September, 1907, there was this result:

Revenue actually received on said commodities being 7.24% of total revenue actually received on all freight traffic in Missouri for said three months.....	$60,639.75
Operating expenses, taxes, rentals and hire of equipment applicable to said revenue for said three months arrived at as follows:	
Total operating expenses, taxes, rentals and hire of equipment, assigned to freight traffic $693,427.16. Proportion (7.24% based on revenue) as-	
231 signed to commodities affected by maximum freight act of 1907.....	$50,204.13
Net revenue on said commodities for said three mos....	$10,435.62
Deduct the diminution in revenue if said act of 1907 had been in effect.....	9,989.43
Leaving.....	$446.19
Deduct extra cost of transporting state freight traffic, assuming such extra cost to be 50%. Schedule 4 shows that 50% increased cost increases revenue percentage from 18.02% to 24.79%, an increase of 6.77% or 37.57%. 37.57% of 7.24% equals 2.72%. 2.72% of total operating expenses excluding taxes, rentals, etc., $618,100.58, equals	$16,812.34
Deficit.....	$16,366.15

(4) Kansas City Southern.

The gross earnings upon commodities affected by the Act of 1907 for six months on $14,014.31 or $28,028.62 for the year, which is 36.17% of all state freight earnings. Applying this to the state freight statement there is this result:

All earnings from this class of state freight were for six months	$14,014.31
All state freight expenses were $26,000.96 and 36.17% of this amount would be.....	9,404.55
Leaving.....	$4,609.76
Diminution if rates fixed by the Act of 1907 had been charged	2,957.58
	$1,652.18
232 36.17% of extra cost at 50%, $11,735.85.....	$4,244.86
36.17% of interest, 5,295.38.....	1,915.34
36.17% of valuation, 13,768.01.....	4,979.89

(5) St. Louis & Hannibal.

The gross earnings upon commodities affected by the Act of 1907 for one year are 33%, or $29,020.86.

Applying this to the state freight statement there is this result:

All earnings from this class of freight were	$29,020.86
All state freight expenses were $76,348.95 and 33% of this amount is	25,195.15
Leaving	3,825.71
Diminution if rates fixed by the Act of 1907 had been charged	15,126.02
Deficit	11,300.31
33% of extra cost at 50%, $12,026.69	$3,968.81
33% of interest, $16,359.44	5,398.61
33% of valuation, $43,041.07	14,203.55

(6) Missouri, Kansas & Texas.

Gross earnings on commodities affected by the Act of 1907 for six months (at 33% of total state freight earnings) would be $91,547.45 or $183,094.90 for the year.

Applying this to the state freight statement there is this result:

All earnings from this class of freight were, for six months	$91,547.45
All state freight expenses were $192,155.42 and 33% of this amount would be	63,411.29
Leaving	$28,136.16
Diminution, if rates fixed by Act of 1907 had been charged	20,222.85
	$7,913.31
33% of extra cost at 50%, $73,879.86	$24,380.00
33% of interest, $62,439.68	20,605.09
33% of valuation, $75,469.96	24,905.09

(7) Chicago, Burlington & Quincy.

The gross earnings upon commodities affected by the Act of 1907 for one year were $526,532.72, which is 31.92% of all state freight earnings, for the year 1905.

Applying this to the state freight statement there is this result:

All earnings from this class of state freight were for one year (31.92% of $1,580,529.64)	$504,505.06
All state freight expenses were $1,322,165.90, and 31.92% of this amount is	422,035.35
Leaving	$82,469.71
Diminution, if the rates fixed by the Act of 1907 had been charged	117,388.07
Deficit	$34,918.36
31.92% of extra cost at 50%, $472,092.76	$150,692.00
31.92% of valuation, $409,325.04	130,656.55

(8) Kansas City, Clinton & Springfield Railway Company.

The gross earnings upon commodities affected by the Act of 1907, for one year are $14,365.00. Since the figures of the company do not show miscellaneous freight earnings, they are estimated at
234 31.92% of all state freight, based on C. B. & Q. figures, as the percentage is the smallest with that company.

Applying this to the state freight statement there is this result:

Earnings from this class of state freight were, for one year	$14,365.00
All state freight expenses were $28,438.06 and 31.92% of this amount is	9,077.43
Leaving	5,287.57
Diminution, if rates fixed by the Act of 1907 had been charged	2,970.21
	$2,317.36
31.92% of extra cost at 50%, $8,483.30	$2,707.87
31.92% of interest, $23,881.78	7,624.66
31.92% of valuation, $33,846.76	10,803.89

Such an estimate as to this company is reasonable, in that this company is actually losing money upon all its business, so that a finding as to these matters is unnecessary.

(9) Chicago Great Western.

Gross earnings on commodities affected by the Act of 1907 for three months were $7,817.28, or $31,269.12 for the year, which is 57.81% of all state freight earnings.

Applying this to the state freight statement, there is this result:

All earnings from this class of state freight were (earnings of 3 months $7,817.28 x 2)	$15,634.56
All state freight expenses were $23,610.13 and 57.81% of this amount would be	13,649.02
Leaving	$1,985.54
235 Diminution, if rates fixed by the Act of 1907 had been charged	1,777.34
	$208.20
57.81% of extra cost at 50%, $9,347.72	$5,403.92
57.81% of interest, $7,164.08	4,141.55
57.81% of valuation, $8,057.70	4,658.16

(10) Other Companies.

As the cases of the other companies abide the result of that of some other case, a finding in this respect is unnecessary.

236 Afterwards, to-wit, on the 30th day of December, 1908, a Certificate of the Trial Judge was filed. Said Certificate is in words and figures as follows:—

In the Circuit Court of the United States, Western District of Missouri, Western Division.

No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY
vs.
HERBERT S. HADLEY, Attorney General, and Others.

No. 2989.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
vs.
JOSEPH P. RICE and Others.

No. 2990.

THE ST. LOUIS SOUTH WESTERN RAILWAY COMPANY
vs.
JOSEPH P. RICE and Others.

No. 2991.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 2992.

THE ST. LOUIS, KANSAS CITY & COLORADO RAILROAD CO.
vs.
JOHN A. KNOTT and Others.

No. 2993.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 2994.

THE ST. LOUIS & HANNIBAL RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 2995.

THE MISSOURI PACIFIC RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 2996.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO.
vs.
JOHN A. KNOTT and Others.

237 No. 2997.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 2998.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 2999.

QUINCY, OMAHA & KANSAS CITY RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 3000.

THE WABASH RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 3001.

THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 3002.

KANSAS CITY, CLINTON & SPRINGFIELD RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 3003.

CHICAGO GREAT WESTERN RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 3006.

THE CHICAGO & ALTON RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

Certificate.

Heretofore this court by order made on the 5th day of March, 1906, referred each and all of the foregoing eighteen cases to F L. Schofield, a Special Master, to take the evidence and report the same to this court with certain findings, as will ap-
238 pear from the order now of record.

Later on the said Schofield proceeded with said hearing and took certain evidence, much of it being oral testimony taken down by stenographers and duly transcribed, and other evidence being in the form of exhibits.

Later on this court by agreement of parties, to-wit, on the 13th day of June, 1908, made an order that the said cases should come on for trial October 5th, 1908, to the Court on the evidence thus taken by the said Special Master, Mr. Schofield, together with such other and further evidence as might be submitted by the respective parties.

October 5th, 1908, the hearing of said cases was upon the application of the defendants continued until the 9th day of November, 1908, at which time the hearing of said cases was proce-ded with and continued with until and including November 14th, 1908 at

which time there was an adjournment of the hearing until December 14th, 1908, when the hearing was again resumed and proce-ded with until the 30th day of December, 1908, when said hearing was concluded, and each, all and every of the parties rested.

The said cases were heard and are to be determined only upon the evidence received by the court, consisting in part of the evidence taken before the Special Master, Mr. Schofield, and in part received by the court in open court, and there was no other or further evidence received by the court, or offered by any party other than that hereinafter scheduled. And in the event of an appeal of any or all of the cases, the clerk will certify to said evidence, subject, however, to such rights as the parties may have under the laws and rules of the Appellate Court to designate what shall be certified up and what omitted.

The evidence so taken by the Special Master, returned and filed in open court and offered in evidence as hereinbefore stated, is as follows:

Five volumes designated as in case No. 2998, marked Volumes I to V, both inclusive, and one volume designated,
239 "2998, Chicago, Burlington & Quincy: Index and Exhibits."

Also annual statements of the Chicago, Burlington & Quincy Railroad Company to the Railroad Commissioners for the years ending respectively, June 30th, 1904, June 30th, 1905, June 30th, 1906, (three copies.)

Also four volumes returned designated as "2995: Missouri Pacific," marked, respectively, Volumes I to IV, inclusive, together with one volume marked "2995, Missouri Pacific Railway: Index and Exhibits." Also the tax return of the Missouri Pacific for June 1st, 1904, June 1st, 1905, the 26th Annual Report of the Missouri Pacific Railway, Exhibit 34, 36-*b*, and 24, in case No. 2995. Also seven analytical sheets of the Missouri Pacific Railway upon form #1939, and seven analytical sheets of the Missouri Pacific Railway upon form #1941, and two analytical sheets of the Missouri Pacific Railway upon form #1940, in case No. 2995.

Also four volumes of testimony marked I to IV inclusive, in case No. 3000, Wabash Railroad. Also one volume endorsed, "3000 Wabash Railroad: Index and Exhibits." Also exhibits marked in case No. 3000 and being designated "Exhibit 15," being the 15th and 17th Annual Report- of the Directors of the Wabash Railroad Company for the years ending June 30th, 1904, and June 30th, 1906, respectively. Also the 15th and 16th Annual Report- of the Directors of the Wabash Railroad Company for the years ending June 30th, 1904, and June 30th, 1905, respectively, each marked "Exhibit 16." Also the 16th and 17th Annual Reports of the Directors of the Wabash Railroad Company for the years ending respectively June 30th, 1905, and June 30th, 1906, each marked "Exhibit 17."

Also one volume returned by the Special Master marked "2989, Atchison, Topeka & Santa Fe Proceedings," as showing certain proceedings had before him the said Special Master.

All the evidence offered before the said Special Master and re-

turned into court and used in these cases and all the proceedings had therein, are included in the papers thus specifically enumerated, each volume and document hereinbefore referred to being now identified by the endorsement thereon of the Trial Judge, "Smith McPherson, Judge."

240 And pursuant to the order of the court and by agreement of parties, the said cases came on for trial to the Court, November 9th, 1908, and said trial was continued from time to time with certain adjournments until December 30th, 1908, when the trial of all the cases was concluded and the said cases by the Court taken under advisement. The evidence taken before the court in open court is contained in volumes identified as follows:

Volume I, marked filed by the clerk, December 30th, 1908, and further identified by the signature of Smith McPherson, Trial Judge. Volume II, marked filed by the clerk December 30th, 1908, and further identified by the signature of Smith McPherson, Trial Judge Volume III, marked filed by the Clerk December 30th, 1908, and further identified by the signature of Smith McPherson, Trial Judge. Volume IV, marked filed by the Clerk December 30th, 1908, and further identified by the signature of Smith McPherson, Trial Judge. Volume V, marked filed by the Clerk December 30th, 1908, and further identified by the signature of Smith McPherson, Trial Judge, said volume V being made up of Exhibits, which together with the exhibits hereinafter scheduled, each and all being marked filed by the Clerk December 30th, 1908, and further identified by the signature of Smith McPherson, Trial Judge, are all the exhibits offered in open court in the trial of said cases; the exhibits other than those in Volume V being as follows: Exhibits A, B, C, D, E, G, H, I, and Exhibits No. 54, 59, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 4, and Exhibit "Douglas I."

And said cases hereinbefore entitled were heard and fully submitted to the Court on the evidence and the exhibits hereinbefore scheduled, and on no other evidence than that hereinbefore schduled. And each, all and every of the parties before final submission after the introduction of the foregoing, by counsel in open court said no further evidence was desired or would be offered in the cases.

241 This certificate is now signed and ordered filed as of this date after the submission of the cases and all of them.

Done in open court this December 30th, 1908.

(Signed) SMITH McPHERSON, *Judge.*

242 Afterwards, to-wit, on the 30th day of December, 1908, the following order was filed and entered of record:—

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. 3006.

THE CHICAGO & ALTON RAILWAY COMPANY,
vs.
JOHN A. KNOTT et al.

Also

In Equity.

RAILROAD COMPANIES
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Being Cases Numbered 2988, 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003 and 3004.

Now on this day again come the parties by their solicitors. Thereupon the hearing of evidence is concluded, whereupon both parties rest, and this case is fully submitted and is by the Court taken under advisement and the orders and decree herein will be rendered and entered of record as of this date.

(Signed) SMITH McPHERSON, *Judge.*

December 30, 1908.

243 Afterwards, to-wit, on the 21st day of January, 1909, the following order was filed and entered of record, to-wit:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY
vs.
HERBERT S. HADLEY, Attorney General, and Others.

No. 2989.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
vs.
JOSEPH P. RICE and Others.

No. 2990.

THE ST. LOUIS SOUTH WESTERN RAILWAY COMPANY
vs.
JOSEPH P. RICE and Others.

No. 2991.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO.
vs.
JOHN A. KNOTT and Others.

No. 2992.

THE ST. LOUIS, KANSAS CITY & COLORADO RAILROAD CO.
vs.
JOHN A. KNOTT and Others.

No. 2993.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 2994.

THE ST. LOUIS & HANNIBAL RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 2995.

THE MISSOURI PACIFIC RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 2996.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO.
vs.
JOHN A. KNOTT and Others.

No. 2997.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
vs.
244 JOHN A. KNOTT and Others.

No. 2998.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 2999.

QUINCY, OMAHA & KANSAS CITY RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 3000.

THE WABASH RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 3001.

THE ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 3002.

KANSAS CITY, CLINTON & SPRINGFIELD RAILWAY CO.
vs.
JOHN A. KNOTT and Others.

No. 3003.

CHICAGO GREAT WESTERN RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 3004.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

No. 3006.

THE CHICAGO & ALTON RAILWAY COMPANY
vs.
JOHN A. KNOTT and Others.

Order.

Each of the foregoing causes came on for hearing this January 20, 1909, the parties appeared by counsel, and admitted that the term of office of Herbert S. Hadley, as Attorney General had expired, and Elliott W. Major was the duly qualified and acting successor and Attorney General of Missouri. He appeared in person, and by the consent of himself and all counsel in the cases, it is ordered that without any formal pleadings, Elliott W. Major, as Attorney General of Missouri be and he is hereby substituted for
245 and in the stead of Herbert S. Hadley, so that all pleadings against and on behalf of said Hadley shall apply to the substituted party as fully as if made against and for him.

(Signed) SMITH McPHERSON, *Judge.*

Afterwards, to-wit, on the 20th day of February, 1909, the following order was filed and entered of record, to-wit:

In the Circuit Court of the United States, Western District of Missouri, Western Division.

No. 2988. Equity.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY
vs.
HERBERT S. HADLEY et al.

And equity cases No. 2989, 2991, 2993, 2994, 2997, 2998, 3002, 3003.

Order.

Whereas, after the cases above numbered had been submitted and argued by agreement of all parties at the request of the Court James Peabody and F. P. Johnson, expert accountants for the railroad companies, and A. P. Taliaferro and T. A. Hamilton, expert accountants for the defendants, compiled statements showing the earnings, operating expenses, etc., for each of said railroad companies for periods of time as therein stated, and affixed a certificate to the effect that said statement in each case correctly shows the results on the various assumptions set forth therein, which said certificate was signed by all four of said expert accountants.

It is therefore ordered that each of said statements be filed and made of record, herein.

Done in open court this February 20th, 1909.

(Signed) SMITH McPHERSON, *Judge.*

246 Afterwards, to-wit, on the 6th day of March, 1909, the following order was filed and entered of record, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY
vs.
HERBERT S. HADLEY et al.

And Also Numbers 2989 to 3004, Inclusive, and 3006.

Order.

By consent of parties, in accordance with agreements heretofore made and not recorded, it is on this March 6th, 1909, ordered:

1. The answers heretofore filed by the Attorney General and Railroad Commissioners, to which replications were filed, shall be treated and adopted by the other defendants who heretofore demurred herein, as their answers duly replied unto.

2. All the evidence taken before the Special Master and in open court, regardless of the particular case in which it was offered, shall be regarded as having been taken and offered in each of the cases tried.

(Signed) SMITH McPHERSON, *Judge.*

We consent to the above order.

FRANK HAGERMAN,
Solicitor for Complainants;
E. W. MAJOR, *Att'y General;*
SANFORD B. LADD,
JOHN KENNISH,
F. W. LEHMANN,
Solicitors for Appearing and Answering Defendants.

247 Afterwards, to-wit, on the 8th day of March, A. D. 1909, the same being a day of the regular November term of said Court, a findings of fact was filed. Said findings of fact is in words and figures as follows:

In the Circuit Court of the United States, Western District of Missouri, Western Division.

No. 2988. Equity.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY
vs.
HERBERT S. HADLEY et al.

And Equity Cases No. 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3006.

Findings of Fact.

Prior to the argument the Court requested counsel on both sides to submit requests for findings of fact. Complainants' counsel did this. Defendants' counsel have not done so. Complainants' requests have been considered, some of which are embodied within the following findings, and some are not.

The following are the findings of fact that the Court makes as based upon the evidence herein;

1. The complainants are the eighteen railroad companies owning and operating lines of railroad in Missouri, they doing all of the state and interstate railroad business therein, and all of them, except the St. Louis & Hannibal Company, having lines of railroad both within and without the state. That company is wholly within

the state, extending from Hannibal, Missouri, to the south 120.61 miles. The Kansas City, Clinton & Springfield Company is a road of about 160 miles in length with 151.01 miles in the state. All the other companies have lines extending into a number of other states, one of them extending into thirteen other states and ter-
248 ritories. These roads with their own lines and with their connecting carriers, carry all the traffic and do all the business, freight and passenger, within the state, whether of state or interstate character. The intra-state business is at all times herein referred to as state business. That part of the interstate business which neither originates within, nor has its destination within, but passes across the State of Missouri, is called transtate business.

2. The same roadbed, locomotives, cars, and trains including all facilities, are used for both classes of business, state and interstate. It is not practicable to conduct the business in any other way. This is so both from the standpoint of the public and that of the companies. If state business were to be carried alone upon some cars and trains, and interstate alone upon others, the expenses would be enormously increased, and almost if not quite prohibitive, while the public would be subjected to delays, inconveniences, and great expense. By reason of all this the business cannot practically be separated.

3. Both from a geographical and railway standpoint Missouri is situated differently from the other states of the Union, there only being two or three other states that have a resemblance to it in these particulars and each of them in a lesser degree. This is so because the Mississippi is its boundary on the east all the distance. From a railroad standpoint the Missouri River is its boundary line on the west, although physically the Missouri River is only the western boundary line from the northwest corner of the state about half way to the southwest corner. But at the half way point, namely, Kansas City, the river turns directly to the east, and continues its way to the Mississippi River. In its production, business and commerce all that part of Missouri to the north of the Missouri River is practically like the south half of Iowa, the country districts producing large quantities of live stock and grain for the market, as well as much bituminous coal. The south half of Missouri is entirely different. The amount of grain and live stock is much less than in the north
249 half of the state. But the south half has a large amount of timber, stone, lime, lead, zinc, iron, and fruits. St. Louis on the east is a city of nearly a million people, Kansas City on the west nearly half as many, while St. Joseph has more than one hundred and twenty five thousand people. These three cities carry on large manufacturing interests. The grain, live stock, and packing house interests at Kansas City and St. Joseph are enormous. For a third of a century or more for reasons which need not be repeated, rates from the East were fixed to the Mississippi River, and later on, from thence to the Missouri River. The interstate rates either in or out were the one plus the other. It was the same from the West. It was likewise the same for the trans-state business going in either direction. Such is the method existing today. This brought about the fact which for years has existed and exists today,

that the short line of road between the two rivers fixes the freight rates. To illustrate, the Burlington road is the short line between the rivers, being 198 miles from Hannibal to St. Joseph, and the same distance, within a few miles, to Kansas City. The roads between Kansas City and St. Louis, and there are four at least of them, including the Burlington, *is* an average distance of nearly 300 miles, but some of the roads being fifty miles or more farther between the points than the others. This brings about the fact that all freight rates between any one point on the one river and any point on the other river are the same as the rate from Hannibal to St. Joseph over the Burlington line. That is to say, the freight rates on any road regardless of distance are the same between St. Louis and either Kansas City or St. Joseph that they are between Hannibal and St. Joseph over the Burlington line. This has given the three cities of St. Louis, Kansas City and St. Joseph great advantages over other points. Competent persons say that to change this system will work irreparable harm to the three cities named, as well as to all other places within the state, by driving both the jobbing and manufacturing business to seaboard points. As to this no finding is made nor opinion expressed
250 because it is believed to be a matter of policy upon which this court in these cases should express no opinion. As to the passenger rates, by reason of competition, the fare is the same between Kansas City and St. Louis, the shorter line fixing the rates, thereby compelling the longer road to be at much expense without remuneration. This is likewise true as to all competitive points.

As to the foregoing question of rates and fares, there is no United States Statute governing the same, and there is no Missouri statute upon the subject except the two statutes questioned by the bills, one dealing with certain commodities per car per distance, and the other fixing the passenger fares at two cents. Aside from these two statutes, and as to any bearing they have as to charges between the two rivers, the conditions named have been brought about and exist today by reason of a long time custom and by reason of transportation, actual and probable, upon the two rivers.

Still further bearing on the question are the following facts: Joplin is a city in the southwestern part of the state of more than twenty-five thousand people. There are a number of towns adjacent thereto, giving that county (Jasper) a population of 200,000 people. It is a very large mining district of lead and zinc. Between Kansas City and Joplin three of complainants herein have railroads. The Missouri Pacific at all points between the said places is within the state. Each of the other two between said points is partly without the state, starting within and going out and coming back, thereby making it interstate business as to two of the roads between Kansas City and the Joplin district. Between Kansas City and St. Joseph, four roads do the business. The Missouri Pacific and Chicago Great Western is each part of the distance within the state of Kansas, while the Burlington and St. Joseph and Grand Island Company is each wholly within the State of Missouri between the two cities. Between St. Joseph and St. Louis two of complainants do practically

all the business, which is very large in both passenger and freight. These are the Burlington and Missouri Pacific. Between
251 said cities the Burlington line is wholly within the state. But the Missouri Pacific line is partly within the state of Kansas, crossing the Missouri River at Atchison and coming back into the state at Kansas City. On the foregoing facts the finding is that the short line between two competitive points necessarily fixes the rate, and the Missouri statutory rates under the statutes in question fix the rates between the cities named. But this is so solely because of the geographical location of cities and railroads, and competition, and long time custom. It is not so either because of a statute or any judicial determination by any of the Courts of Missouri.

4. Pending this litigation, each of the complainant companies made and delivered to defendants statements showing the earnings and expenses for certain periods, which statements have been taken by both sides as sufficiently illustrative of the situation for the determination of these cases. The companies extended to the state officers, defendants herein, acting by experts by them selected, the oportunity to examine the statements and the books, papers, vouchers, and records of the companies. The freight rate statute of 1907 as to commodities mentioned allowed greater rates than did the statute of 1905 assailed by the original bills of complaint herein, and it was conceded at the trial that if the rates fixed by the Act of 1907 were confiscatory, that those fixed by the Act of 1905 were likewise.

5. The parties were producing evidence and preparing their evidence for about one year with the aid of experts on each side. These experts were all men of high character and great proficiency as railroad accountants. The experts on each side were given the fullest opportunity and all the time desired to obtain the information and put the same in form in exhibits, schedules, and reports, all of which are in evidence in the cases, supplemented by the oral testimony of each of the experts with reference to all of these things.

6. It was conceded by the experts that the companies fairly, accurately and honestly kept their books showing the facts in these findings set forth. The experts of the state and of the companies
252 have thereby been enabled to present with certainty and precision all the earnings within the state, both state and interstate business. But obtaining and compiling this information by the experts has been at great expense of time and money. One exception to the foregoing is to be noted as to passenger fares for a short period of time after the two cent fare law became operative. By agreement of both sides in open court in June, 1907, this Court issued a temporary writ of injunction against the enforcement of the freight rate statute. The complainants asked for a temporary injunction against the enforcement of the two cent passenger fare statute. This Court held that the statute should be given a trial for five months and ascertain the result by actual operation. In preparing the order counsel, no doubt by inadvertence, fixed three months as the period for

trial as to results. But by acquiescence of both sides, or if not, by delays with which the Court was not chargeable, such status remained for more than one year, and the cases were not actually brought on for trial until in November, 1908. But after the statute became operative in June, 1907, and this Court denied the temporary writ of injunction, the interstate passenger rates remained as they were for a period of about two months. During the time that condition prevailed parties both coming into and going out of Missouri on interstate journeys would buy tickets to the state line, thereby obtaining the benefit of the two cent fare for all distance within the state. It was not possible for the companies to show the truth as to the number of such trips, and therefore it is not possible for the Court to find just how much of the earnings *were* on account of such interstate trips. But the extent, whatever it was, would make an erroneous showing as to state earnings, though favorable to defendants, because such earnings were of an interstate character. But even though for the short time a part of the business was thus carried on so that additional earnings were erroneously placed to the credit of the state, still the results are not changed, for the error was against, and not in favor of complainants.

Freight earnings, both state and interstate, are made up from earnings of transportation and another item called "Miscellaneous
253 freight," composed of switching, demurrage, and storage charges, and track and equipment rentals. Passenger earnings are made up of passenger fares and miscellaneous, the latter covering mail, express, excess baggage, storage, rentals, and possibly some other terminal earnings.

No difference of consequence has arisen between the parties as to the expense of doing the entire business in the state. With reasonable certainty the expenses for doing the freight and passenger, including miscellaneous of each, can be and have been separated.

The earnings are known and fixed and in these findings stated to a certainty. But as to the expenses as between state and inter-state business, there has been a controversy and such is the principal controversy in the cases. There is no known fixed or certain rule for determining how this separation of expenses shall be made. The same cannot be made with mathematical certainty. Complainants claim that the division should be made upon the revenue basis; defendants claim that it should be made upon the ton mile basis for freight, and passenger mile basis for passengers, classifying the miscellaneous earnings as and with freight and passenger earnings respectively. By the revenue basis is meant to assign such proportion of the total expense in the state on that class of business as the earnings of that class of state business bears to all the earnings state and interstate from the same class, or, which is the same thing, ascertain what the percentage of all expenses is of all earnings, then multiply that by the state earnings of any class, and thus obtain the sum to be assigned as state expense. The ton mile basis as to freight means the assignment as state freight expenses of any class of business such proportion of all state expense as the number of ton miles of state freight bears to the total ton

miles of all freight hauled within the state. By the passenger mile basis is meant the assignment as state passenger expenses such proportion of all passenger expenses as the number of passengers in state business carried one mile bears to the whole number of passengers state and interstate carried one mile.

254 For reasons stated in an opinion herein filed, the revenue basis has been and is adopted as the only logical basis to use in arriving at a correct conclusion. The one basis or the other as a whole must be adopted. Either side can make a better showing by adopting the one basis in part of the accounting, and the other basis for the other. Neither should be and is allowed to do this. As will presently appear, the state has attempted to do this in making its passenger earnings accountings.

7. Each basis for accounting has some defects, but they are minor and not controlling and do not change the result if the revenue basis is taken.

The expense of doing the state business over interstate is greater for carrying freight by at least fifty per cent., and at least twenty-five per cent for carrying passengers. Therefore this extra cost must be added to the expenses after they have been ascertained so as to obtain the total expense. If the ton mile basis of division were adopted, the extra cost should also be added. This would require the use of another multiplier sufficient to bring the sum total of the state freight expense equal to that found herein, to actually represent the cost as shown by the evidence. Any apportionment of passenger expense upon the passenger mile basis would be unfair and unjust, although much more favorable to the companies than if made upon the revenue basis.

8. All things considered, the evidence shows the cost of doing the different classes of state business as between state and interstate apportioned upon the revenue basis with added extra cost brings a result in these findings stated, which is fair and representative and just. The Court finds, aside from the revenue basis, that the evidence shows the amount ascertained in each case as the expense and extra cost, is fair and justly represents the expense of doing each class of state business. The extra cost as to each complainant for doing the state business over interstate is more than fifty per cent in case of freight, and more than twenty-five per cent in case of passenger. This extra expense as thus found

255 is considerably in excess of these figures and the figures used are adopted as the minimum. The sum total of this extra cost if ascertained according to the ton-mile theory, would not be changed because it is a question of multiplication, and one multiple or another must be used accordingly as the theory is adopted. The findings herein made on all the evidence represent in dollars the fair cost and expense fixed at a minimum. There has also been considered and found in each case such sum as would equal the diminution of earnings upon the commodities covered by the freight rate statutes of 1905 and 1907 if the rates thus fixed had been charged, as there would have been but for the temporary injunctions herein issued.

9. The evidence shows that each of complainants has regularly

paid for many years' interest on its bonds. There is no evidence to show that any of the railroad property within the State of Missouri has an undue amount of bonds or is unfairly bonded, and the evidence does not show that any of the bonds provide for interest in any sum greater than such bonds should carry. It does show that most of the bonds are at the lowest rates of interest, and much less than the legal rate allowable in Missouri. In thus referring to interest, the St. Louis & Hannibal, and Kansas City, Clinton & Springfield companies are excepted.

10. After the adoption of the two cent fare statute, there was no substantial increase in travel. For a few weeks there was a small increase largely brought about by interstate passengers buying tickets to state lines, and in part by the novelty. What if any increase of travel occurred by reason of said two cent fare, would be a mere approximation. It has not been substantial, and there is no reason to believe that any such increase will be brought about in the future by a two cent fare.

11. The values of the railroad properties in the State of Missouri are found, in the cases tried, to be as follows:

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	Miles.	Value.	Value per mile.
St. Louis & San Francisco..	1688.89	$61,238,414.70	$36,259.00
Atchison, Topeka & Santa Fe	348.31	15,091,212.00	43,326.00
Chicago, Rock Island & Pacific	515.48	19,102,507.59	37,058.00
Kansas City Southern.....	174.48	8,039,084.40	46,075.00
St. Louis & Hannibal.....	120.61	1,143,077.02	9,477.00
Missouri, Kansas & Texas...	506.21	20,894,229.93	41,276.00
Chicago, Burlington & Quincy	1136.34	53,172,907.83	46,793.00
Kan. City, Clinton & Springf'd	151.01	2,380,222.48	15,762.00
Chicago Great Western	84.43	3,605,236.38	42,701.00

With the exceptions hereinafter stated, the above valuations of the properties of said nine companies as fixed, are in fact practically the same as those fixed by the state assessing board for the purpose of taxation. But aside and apart from the valuations thus fixed by the state board, these findings are that upon the whole evidence said properties are at least of the values above fixed. The evidence shows that included in such sums the state board after making certain valuations under the heading of "all other property" fixed certain valuations, which when added give the totals as above. In argument it was contended that "all other property" included franchise values. This is not deemed important because it is difficult to see wherein steam railroad property like those involved, can have a franchise value. But waiving that, any franchise value that the state board could have considered, was necessarily so small a per cent of the total valuations fixed by the state board as to make no appreciable difference in the result of these

cases, because it altogether admitted the remaining value is such that no road could obtain a return to which it is herein found to be entitled. But if the property has a franchise value for taxation, it also has such valuation as an earning power or, rather, upon which returns should be made. In fixing the valuations above set forth there have been considered the immense terminal values
257 of most of the roads, the amount of stock and bonds outstanding, what it would cost to duplicate the properties both with and without terminals in the large cities, and all the evidence bearing on present values, and in fixing said valuation the sums found are the minimum valuations, the properties being worth at least the sums thus fixed.

The foregoing valuations are the same as fixed by the state assessing board except as to the property of the St. Louis & Hannibal and of the Kansas City, Clinton & Springfield in the state, which are found to be worth sixty-six and two-thirds per cent of the valuations of the state boards

12. The interest obligations except as already stated are just and reasonable and should be paid in full with some dividends to the stockholders in addition. However, and entirely aside from the question of interest, the rates and earnings should in any event be such as to produce a fair return upon the valuations hereinbefore fixed.

And such earnings should be on the property within the state as would be equivalent to six per centum per annum, that per cent. being a fair return upon such valuations.

13. About the same time the two cent fare statute became operative, passes and other forms of reduced and free transportation, were abolished. Since that time they have not been given nor used except in cases of employés actually employed. The passenger earnings were thereby increased, but such increase was not more than approximately one per cent.

14. After the arguments were concluded at the request of the Court, and with the consent of the parties, two experts upon each side, two selected by the railways and two by the defendants, worked with the Court for something more than one week. These experts were the same gentlemen representing their respective sides who had done much of the work in preparing the cases for the respective sides for hearing. The Court requested these experts to take the numerous tables and tabulate them already in evidence and to confine themselves wholly to that which had been introduced in evidence in the cases, and to make therefrom a new table for each of the
258 nine cases showing the earnings and the expenses chargeable to each class of earnings according to the respective theories covered by counsel in the arguments. The Court further requested said four experts after preparing said new tables that if they agreed, to affix their signatures thereto. This they did below a certificate reciting that the statement of earnings, operating expenses, etc., as to each particular road for the time therein given, correctly shows the results on the various assumptions set forth therein. Said nine statements were by order of this Court, February 20,

1909, ordered filed and made of record in the cases. The said nine statements are now and here referred to, and are made part hereof. Each of said nine statements is found by the Court to be correct upon the respective theories presented. But the theory entitled as the "state's basis" is rejected for the reason that said statement improperly divides miscellaneous earnings, placing an undue proportion to the benefit of the state. And said basis improperly makes a division of expense upon the ton mile and passenger mile basis and does not allow a sufficient amount of extra cost of doing state business, and the same does not allow enough for the value of the property in that it deducts all sums included "all other property" multiplied by three.

If the companies had been permitted to charge the amounts per passenger per mile which they did charge and receive prior to the two cents passenger fare statute, they would have received in addition to that which they did receive by reason of the statute and by reason of the temporary injunction being denied for earnings within the state for a period of twelve months last preceding the submission of the cases, the following sums: (Interstate, however, not controlled by statute, but by changed conditions.)

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Name of road	State passengers.	Interstate passengers.
St. L. & S. F. R. R.	$666,008.72	$509,730.63
A. T. & S. F. R. R.	30,885.52	66,271.03
C. R. I. & P. Ry. and St. L. K. C. & C. Ry.	124,469.14	111,178.60
K. C. So. Ry.	7,044.49	27,260.75
St. L. & H. Ry.	37,275.38	145.23
M. K. & T. Ry.	140,593.46	63,815.12
K. C. C. & S. Ry.	14,654.57	10,846.91
C. B. & Q. R. R.	394,878.77	261,556.41
C. G. W. Ry.	49,459.47	34,621.62

In the case of the St. Louis & San Francisco there were included in expenses sums paid as rentals under a lease given by the Kansas City Fort Scott & Memphis Railway Company, whose common stock is owned by it which operates the company under a lease requiring it to pay to the holders of preferred stock of the Fort Scott & Memphis Company, as a rental, a sum equal to four per per cent annual dividends. This lease has been in force several years and is a fair one, and such rental has been treated as an operating expense, and is not included in fixed charges. And the Court finds that it is an operating expense. But even if it were a fixed charge, it is not material as the result would not be changed even though the rentals were carried into the fixed charge account. This is so because the amounts carried into state freight expense is only $8,428.56 and interstate passenger expense, $7,443.68.

15. In the statements hereinbefore referred to made and signed by the four experts, while they correctly set forth the figures on both the revenue theory and the ton and passenger mile theory the placing of the miscellaneous earnings of the passenger business is arbitrarily

fixed and does not at all proceed upon the passenger mile basis, but for that the revenue basis is taken and fixed. Such earnings are arbitrarily divided without reference to the facts, the result being the State earnings and especially passenger, are fixed much higher than the actual earnings. Said division instead of fol-
260 lowing defendants' theory of the ton mile and passenger mile basis, is upon the revenue basis from which it is seen that this would be a splitting of theories. But from this and from all the evidence it is plain that even the ton and passenger mile basis theory cannot be worked out without showing a law, to prevent which an arbitrary change of account must be made as to the miscellaneous business. Even in making this arbitrary change the revenue basis is used, and yet the revenue division of expenses insisted upon by complainants is said not to be recognized. This is utterly illogical and unfair, and does not represent the true facts as to whether such earnings are made at a loss, and there is no reliance whatever to be placed in such method of accounting. In so finding no reflection whatever is made upon the experts for the state, because as before found they are men of the highest character and learning and highly skilled in accounting and with a proper basis for such accounting their work is perfect. And from their own statements upon the basis adopted herein for making such accounting by the Court, the freight business for the period mentioned would have been done at a loss if the statutory rates had been observed, and the passenger business was done at a loss under the two cent fare statute.

16. As to each of the nine companies whose cases have been submitted, the earnings and expenses and all other items are different in amount. So with the returns upon value to which the company is entitled. But in no event in any of the cases tried would the freight earnings, after making the deductions herein found result in a return to any company of more than three per cent. With nearly every company an actual deficit is shown if the 1907 statute had been in force. So under the two cent fare statute a deficit as to nearly all of the companies, and not more than two per cent. in case of any company. If the freight and passenger business should be combined with the miscellaneous of each class, there would be a deficit as to some and not to exceed three per cent. as to any of the others. In arriving at these conclusions and in adopting the tabulations herein set forth an account has been taken of all earnings, state and interstate, freight and passenger, and miscellaneous; the proportion which state and interstate freight and passenger exclusive
261 of miscellaneous bear to all state and interstate, miscellaneous included, and that which they bear to all the earnings of the state; of miscellaneous freight and miscellaneous passenger earnings, undivided as between state and interstate, with the proportion they are of all earnings, freight and passenger; of all expenses divided as between all kinds of freight and passenger business, including miscellaneous, but not divided as between state and interstate; of the deductions to be made from all state freights not including miscellaneous of such proportion of expenses of all freight and

passenger respectively as the freight and passenger earnings exclusive of miscellaneous bear to all earnings; of the deduction of the extra cost; of the diminution of freight earnings if the freight rate statute had been observed; of the value of that portion of the property assignable to the particular traffic. This value is found by taking for each class of business of the entire value of the property in the state, such proportion as the earnings on that portion of the business bear to all the earnings in the state. A statement so made as to each of the companies whose cases have been submitted is as follows:

17. The periods taken are representative taken by the experts upon both sides, and were for the months set forth in the column headed "time." These tables do not follow the form taken by the experts in preparing exhibits to be introduced in evidence, nor do they follow the prepared form adopted by the four experts in making the nine statements hereinbefore referred to. An attempt has been made to abbreviate, but with the results the same as adopted by the experts. These are found to be correct as now to be set forth, and are adopted by the Court. If any error has crept into them, the Court will make proper correction upon his attention being called thereto after these findings have been filed, which can be readily done upon motion or suggestion. The tables adopted by the Court now follow:

262 *Interstate Freight.*

Company.	Time Mo.	Amount.	% of all freight.	% of all earnings.
St. L. & S. F. R. R....	3	$2,214,002.82	76.94	54.68
A. T. & S. F. R. R.....	6	1,872,915.00	90.05	67.72
C. R. I. & P. Ry.....	3	665,228.16	79.38	59.86
K. C. So. Ry.....	6	702,249.91	79.35	67.11
St. L. & H. Ry.....	12	51,735.05	36.25	24.61
M. K. & T. Ry.....	6	1,333,455.26	81.73	57.89
C. B. & Q. R. R.....	12	6,454,699.87	78.75	52.40
K. C. C. & S. Ry.....	12	116,893.60	68.27	41.04
C. G. W. Ry.....	6	224,169.58	86.02	57.39

State Freight.

Company.	Amount.	% of all freight.	% of all earnings.
St. L. & S. F. R. R.....	$577,192.84	20.04	14.26
A. T. & S. F. R. R.....	141,133.00	6.79	5.10
C. R. I. & P. Ry.....	150,953.68	18.02	13.58
K. C. So. Ry.....	38,748.76	4.38	3.70
St. L. & H. Ry.....	87,941.99	61.62	41.84
M. K. & T. R. R.....	277,416.52	17.01	12.04
C. B. & Q. R. R.....	1,580,529.64	19.28	12.83
K. C. C. & S. Ry.....	45,003.15	26.29	15.80
C. G. W. Ry.....	29,129.36	11.18	7.45

Miscellaneous Freight.

Company.	Amount.	% of all freight.	% of all earnings.
St. L. & S. F. R. R.	$86,814.57	3.02	2.14
A. T. & S. F. R. R.	65,833.56	3.16	2.38
C. R. I. & P. Ry.	21,815.70	2.60	1.96
K. C. So. Ry.	144,046.62	16.27	12.77
St. L. & H. Ry.	3,044.11	2.13	1.45
M. K. & T. Ry.	20,603.37	1.26	0.89
C. B. & Q. Ry.	161,579.41	1.97	1.31
K. C. C. & S. Ry.	9,319.58	5.44	3.27
C. G. W. Ry.	7,280.24	2.80	1.86

263 *Interstate Passenger.*

Company.	Amount.	% of all passenger.	% of all earnings.
St. L. & S. F. R. R.	$368,687.43	31.49	9.11
A. T. & S. F. R. R.	355,318.12	51.81	12.85
C. R. I. & P. Ry.	113,524.21	41.53	10.22
K. C. So. Ry.	89,504.58	55.47	8.55
St. L. & H. Ry.	198.19	0.29	0.09
M. K. & T. Ry.	303,214.54	45.12	13.16
C. B. & Q. Ry.	1,777,788.27	43.15	14.43
K. C. C. & S. Ry.	41,145.00	36.22	14.45
C. G. W. Ry.	72,360.87	55.62	18.53

State Passenger.

Company.	Amount.	% of all passenger	% of all earnings.
St. L. & S. F. R. R.	$599,051.59	51.17	14.79
A. T. & S. F. R. R.	104,370.19	15.22	3.77
C. R. I. & P. Ry.	114,853.04	42.02	10.33
K. C. So. Ry.	31,865.28	19.75	3.05
St. L. & H. Ry.	52,667.38	78.04	25.05
M. K. & T. R. R.	246,368.53	36.66	10.70
C. B. & Q. R. R.	1,611,702.92	39.11	13.09
K. C. C. & S. Ry.	47,646.80	41.95	16.73
C. G. W. Ry.	38,105.03	29.28	9.75

Miscellaneous Passenger.

Company.	Amount.	% of all passenger	% of all earnings
St. L. & S. F. R. R.	$203,077.28	17.34	5.02
A. T. & S. F. R. R.	226,080.00	32.97	8.18
C. R. I. & P. Ry.	44,980.08	16.45	4.05
K. C. So. Ry.	39,973.54	24.78	3.82
St. L. & H. Ry.	14,619.99	21.67	6.96
M. K. & T. Ry.	122,458.22	18.22	5.32
C. B. & Q. R. R.	731,021.89	17.74	5.94
K. C. C. & S. Ry.	24,797.39	21.83	8.71
C. G. W. Ry.	19,643.99	15.10	5.02

264 18. All freight and Passenger Expenses, including Miscellaneous, less taxes and rentals, and percentages to earnings, undivided as between State and Interstate.

Company.	Freight.	Passenger.	Taxes and rentals, freight.	Taxes and rentals, passengers.
St. L. & S. F. R.	1,802,813.26	974,816.61	112,452.04	38,979.63
A. T. & S. F.	1,382,738.65	572,167.20	32,361.50	10,854.04
C. R. I. & P.	619,199.73	317,633.62	74,227.43	21,015.44
K. C. So.	571,297.54	141,432.56	22,331.70	3,737.37
St. L. & H.	117,908.81	68,343.04	5,994.07	2,273.61
M. K. & T.	1,010,643.65	516,589.98	119,017.87	58,465.49
C. B. & Q.	6,793,610.60	3,527,311.81	12,235.30cr.	6,152.58cr.
K. C. C. & S.	98,988.29	138,384.77	9,182.36	5,749.38
C. G. W.	198,887.69	126,355.88	12,294.18	11,312.16

Company.	% of said expenses to earnings, exclusive of taxes and rentals.		Same, including taxes and rentals.	
	Freight.	Passenger.	Freight.	Passenger.
St. L. & S. F. R. R...	62.64	83.26	3.91	3.33
A. T. & S. F. R. R....	66.48	83.43	1.55	1.58
C. R. I. & P. Ry.....	73.89	116.20	8.86	7.68
K. C. So. Ry.....	64.55	87.66	2.52	2.31
St. L. & H. Ry.....	82.61	101.27	4.19	3.37
M. K. & T. Ry.....	61.95	76.87	7.29	8.69
C. B. & Q. Ry.....	82.88	85.60	0.00	0.00
K. C. C. & S. Ry.....	57.81	121.83	5.36	5.06
C. G. W. Ry.....	76.33	97.11	4.71	8.68

The time of the foregoing tables is the same as in first table above.

19. The following nine tables show the state earnings and expenses, valuation, return on value, and interest charge of the said nine roads respectively whose cases have been submitted. The other cases are to be covered by decrees by agreement the same as certain decrees of the nine cases, all of which is of record.

265 ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

Period, Three Months.

State earnings and expenses.	Freight.		Passenger.	
State earnings.....	577,192.84		599,051.59	
State expenses.....	361,644.33		498,716.20	
Leaving.....	215,548.51		100,335.39	
Less taxes and rentals...	22,760.29		20,097.90	
Leaving.....	192,788.22		80,237.49	
Extra cost of doing state business, freight 50%, passenger 25%	131,425.08		53,907.36	
Leaving.....	61,363.14		26,330.13	
Diminution in earnings if the state rates in question had been charged.	11,389.27		.....	
Leaving.....	49,973.87		26,330.13	
Valuation:				
Assignable proportion of value for representative period, and 6% interest thereon, is.....	130,988.97	14.26%	135,857.42	14.79%

Return on value:				
(*a*) Actual return upon the assignable value found in subdivision above, the amount shown in first subdivision above is	.....	2.29%	.....	1.16%
(*b*) Same without allowance for extra cost.	.....	8.2%	.....	3.5%
Interest charge:				
Actual interest charge paid on assignable properties	116,792.45		121,133.27	

266 ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

Period, Six Months.

State earnings and expenses.	Freight.		Passenger.	
State earnings	141,133.00		104,370.19	
State expenses	92,581.89		87,834.09	
Leaving	48,551.11		16,536.10	
Less taxes and rentals...	3,503.41		901.74	
Leaving.....	45,047.70		15,634.36	
Extra cost of doing state business, freight 50%, passenger 25%	41,859.55		17,947.71	
Leaving.....	3,188.15		2,313.35	(red ink) (deficit)
Diminution in earnings if the state rates in question had been charged.	13,885.87		.....	
Leaving.....	10,697.72	(red ink) (deficit)	2,313.35	(red ink) (deficit)
Valuation:				
Assignable proportion of value for representative period, and 6% interest thereon	23,089.35	5.10%	17,068.16	3.77%

Return on value:				
(*a*) Actual return upon the assignable value found in subdivision above, the amount shown in first subdivision above is.....	.....	nothing	.....	nothing
(*b*) Same without allowance for extra cost.	.....	8%	.....	5.49%
Interest charge:				
Actual interest charge paid on assignable properties	17,934.56		13,257.51	

267 THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

Period, Three Months.

State earnings and expenses.	Freight.		Passenger.	
State earnings	150,953.68		114,853.04	
State expenses	111,579.80		133,469.65	
Leaving.....	39,373.88		18,616.61	(red ink) (deficit)
Less taxes and rentals...	13,375.78		8,830.68	
Leaving.....	25,998.10		27,447.29	(red ink) (deficit)
Extra cost of doing state business, freight 50%, passenger 25%	41,919.82		17,501.61	
Leaving.....	15,921.72	(red ink) (deficit)	44,948.90	(red ink) (deficit)
Diminution in earnings if the state rates in question had been charged.	9,989.43		.....	
Leaving.....	25,911.15	(red ink) (deficit)	44,948.90	(red ink) (deficit)
Valuation:				
Assignable proportion of value for representative period and 6% interest thereon	38,911.81	13.58%	29,599.34	10.33%

Return on value:				
(*a*) Actual return upon the assignable value found in subdivision above, the amount shown in first subdivision above is.....	.....	nothing	.....	nothing
(*b*) Same without allowance for extra cost.	.....	2.47%	.....	nothing
Interest charge:				
Actual interest charge paid on assignable properties	24,907.02		18,946.21	

268 THE KANSAS CITY SOUTHERN RAILWAY COMPANY.

Period, Six Months.

State earnings and expenses.	Freight.		Passenger.	
State earnings	38,748.76		31,865.28	
State expenses	25,022.83		27,932.93	
Leaving.....	13,725.93		3,932.35	
Less taxes and rentals...	978.13		738.13	
Leaving.....	12,747.80		3,194.22	
Extra cost of doing state business, freight 50%, passenger 25%	11,711.60		5,346.15	
Leaving.....	1,036.20		2,151.95	(red ink) (deficit)
Diminution in earnings if the state rates in question had been charged.	2,957.58		.....	
Leaving.....	1,921.38	(red ink) (deficit)	2,151.93	(red ink) (deficit)
Valuation:				
Assignable proportion of value for representative period, and 6% interest thereon	8,923.38	3.70%	7,355.76	3.05%

Return on value:				
(*a*) Actual return upon the assignable value found in subdivision above, the amount shown in first subdivision above is.....	.....	nothing	.....	nothing
(*b*) Same without allowance for extra cost.	.....	6.58%	.....	2.6%
Interest charge:				
Actual interest charge paid on assignable properties	5,295.38		4,365.11	

269 THE ST. LOUIS & HANNIBAL RAILWAY COMPANY.

Period, Twelve Months.

State earnings and expenses.	Freight.		Passenger.	
State earnings	87,941.99		52,667.38	
State expenses	72,655.40		53,334.91	
Leaving.....	15,286.59		667.53	(red ink) (deficit)
Less taxes and rentals...	3,693.55		1,774.32	
Leaving.....	11,593.04		2,441.85	(red ink) (deficit)
Extra cost of doing state business, freight 50%, passenger 25%	12,026.69		2,444.68	
Leaving.....	433.65	(red ink) (deficit)	4,886.53	(red ink) (deficit)
Diminution in earnings if the state rates in question had been charged.	15,126.02		.....	
Leaving.....	15,559.67	(red ink) (deficit)	4,886.53	(red ink) (deficit)
Valuation:				
Assignable proportion of value for representative period, and 6% interest thereon	28,694.05	41.84%	17,179.40	25.05%

Return on value:				
(*a*) Actual return upon the assignable value found in subdivision above, the amount shown in the first subdivision above is.....	.....	nothing	.....	nothing
(*b*) Same without allowance for extra cost.	.....	nothing	.....	nothing
Interest charge:				
Actual interest charge paid on assignable property	16,359.44		9,794.55	

270 MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

Period, Six Months.

State earnings and expenses.	Freight.		Passenger.	
State earnings	277,416.52		246,368.53	
State expenses	171,910.48		189,381.89	
Leaving.....	105,506.04		56,986.64	
Less taxes and rentals...	20,244.94		21,433.45	
Leaving.....	85,261.10		35,553.19	
Extra cost of doing state business, freight 50%, passenger 25%	66,096.09		27,482.59	
Leaving.....	19,165.01		8,070.60	
Diminution in earnings if the state rates in question had been charged.	20,222.85		.....	
Leaving.....	1,057.84	(red ink) (deficit)	8,070.60	
Valuation:				
Assignable proportion of value for representative period, and 6% interest thereon	75,469.96	13.04%	67,070.48	10.70%

Return on value:				
(*a*) Actual return upon the assignable value found in subdivision above, the amount shown in the first subdivision above is.....	.....	nothing	.....	0.72%
(*b*) Same without allowance for extra cost.	.....	5.18%	.....	3.18%
Interest charge:				
Actual interest charge paid on assignable property	62,439.68		55,490.41	

271 CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

Period, Twelve Months.

State earnings and expenses.	Freight.		Passenger.	
State earnings	1,580,529.64		1,611,702.92	
State expenses	1,324,453.83		1,489,746.71	
Leaving.....	256,075.81		121,956.21	
Less taxes and rentals...	2,487.99	cr.	2,798.50	cr.
Leaving.....	258,563.80		124,754.71	
Extra cost of doing state business, freight 50%, passenger 25%	484,129.29		158,205.70	
Leaving.....	225,565.49	(red ink) (deficit)	33,450.99	(red ink) (deficit)
Diminution in earnings if the state rates in question had been charged.	112,533.71		.....	
Leaving.....	338,099.20	(red ink) (deficit)	33,450.99	(red ink) (deficit)
Valuation:				
Assignable proportion of value for representative period, and 6% interest thereon	409,325.04	12.83%	417,620.02	13.09%

Return on value:				
(*a*) Actual return upon the assignable value found in subdivision above, the amount shown in the first subdivision above is.....	.....	nothing	.....	nothing
(*b*) Same without allowance for extra cost.	.....	2.11%	.....	1.79%
Interest charge:				
Actual interest charge paid on assignable property	132,735.02		135,424.89	

272 KANSAS CITY, CLINTON & SPRINGFIELD RAILROAD COMPANY.

For Period of Twelve Months.

State earnings and expenses.	Freight.		Passenger.	
State earnings	45,003.15		47,646.80	
State expenses	26,024.02		58,052.41	
Leaving.....	18,979.13		10,405.61	(red ink) (deficit)
Less taxes and rentals...	2,414.04		2,411.86	
Leaving.....	16,565.09		12,817.47	(red ink) (deficit)
Extra cost of doing state business, freight 50%, passenger 25%	8,483.30		7,625.00	
Leaving.....	8,081.79		20,442.47	(red ink) (deficit)
Diminution in earnings if the state rates in question had been charged.	2,970.21		.....	
Leaving.....	5,111.58		20,442.47	(red ink) (deficit)
Valuation:				
Assignable proportion of value for representative period, and 6% interest thereon	22,564.51	15.80%	23,892.67	16.73%

Return on value:				
(*a*) Actual return upon the assignable value found in subdivision above, the amount shown in the first subdivision above is.....	.....	1.36%	.....	nothing
(*b*) Same without allowance for extra cost.	.....	3.61%	.....	nothing
Interest charge:				
Actual interest charge paid on assignable property	23,881.78		25,288.48	

273 CHICAGO GREAT WESTERN RAILWAY COMPANY.

Period, Six Months.

State earnings and expenses.	Freight.		Passenger.	
State earnings	29,129.36		38,105.03	
State expenses	22,235.64		36,996.98	
Leaving.....	6,893.72		1,108.05	
Less taxes and rentals...	1,374.49		3,312.25	
Leaving.....	5,519.23		2,204.20	(red ink) (deficit)
Extra cost of doing state business, freight 50%, passenger 25%	9,347.72		6,090.35	
Leaving.....	3,828.49	(red ink) (deficit)	8,294.55	(red ink) (deficit)
Diminution in earnings if the state rates in question had been charged.	1,893.41		.....	
Leaving.....	5,721.90	(red ink) (deficit)	8,294.55	(red ink) (deficit)
Valuation:				
Assignable proportion of value for representative period, and 6% interest thereon	8,057.70	7.45%	10,545.32	9.75%

Return on value:		
(a) Actual return upon the assignable value found in subdivision above, the amount shown in the first subdivision above is.....	**..... nothing**	**..... nothing**
(b) Same without allowance for extra cost.	**..... 2.69%**	**..... nothing**
Interest charge:		
Actual interest charge paid on assignable property	**7,164.08**	**9,375.81**

20. The Court believes that the foregoing findings are all
274 that are material and all that are necessary to make. However, if any party believes that any material finding of fact has been omitted, upon application of such party the same will be considered and made if deemed advisable. And likewise if any of the foregoing computations or figures have been erroneously made. But such application to be entertained must be made within thirty days from this date.

And each, all and every of the foregoing are made as the findings of the Court, and are now and here in open court this March 8th, 1909, ordered filed and made of record in said cases and all of them.

(Signed) SMITH McPHERSON, *Judge.*

275 Afterwards, to-wit, on the 22nd day of March, A. D. 1909, the same being a day of the regular November term of said Court, a final decree was filed and entered of record.

Said decree is in words and figures as follows:

276 In the Circuit Court of the United States, Western District of Missouri, at Kansas City.

No. 3006. Equity.

THE CHICAGO & ALTON RAILWAY COMPANY, Complainant,

vs.

JOHN A. KNOTT, JOSEPH P. RICE, and FRANK A. WIGHTMAN, Railroad Commissioners of the State of Missouri; Herbert S. Hadley, Attorney General of the State of Missouri; William T. Kemper, and Alexander McKenzie; Joseph M. Patterson, Charles E. Moss and George Dodd, County Judges, and Arthur C. Warner, County Treasurer; H. R. Oglesby, Railroad Commissioner of the State of Missouri; Lee Dunlap and Fred C. Urfer; and Elliott W. Major, Attorney General of the State of Missouri, Respondents.

Final Decree.

The above entitled case this March 8th, 1909, comes on for final decree upon the evidence and stipulations upon file and of record

herein, the cases having heretofore been fully argued and fully submitted and taken under advisement. And now at this time the Court being fully advised in the premises, the parties appearing by their respective counsel, for reasons stated in an opinion by the Trial Judge and findings of fact signed and filed herein, orders, adjudges and decrees:

1. The maximum freight rate laws of Missouri, of 1905 and 1907, and the passenger rate law of 1907, mentioned in paragraph 2 hereof, and set forth in the original bill and amendments and supplements thereto, are unreasonable and confiscatory; do not afford the complainant any fair or reasonable return upon the value of its property, and to comply therewith would take the property of complainant without due process of law. None of the provisions thereof should or can be rightfully decreed against complainant, its officers,
277 agents or employés. A finding of fact has been prepared and filed, and is hereby referred to as if made part hereof.

2. Defendants Elliott W. Major, Attorney General of the State of Missouri, John A. Knott, H. R. Oglesby, and Frank A. Wightman, Railroad Commissioners of the State of Missouri, and each of them, their agents, employés and successors, are hereby enjoined from enforcing, or attempting, directly or indirectly, by suit or in any other manner whatsoever, to enforce against complainant, its officers, agents, employés or servants, any of the provisions of, or penalties provided for in the following acts of the legislature of the State of Missouri:

First, an act approved April 14, 1905, entitled:

"An act to amend article IV, chapter 12 of the Revised Statutes of Missouri of 1899, entitled 'Railroads classification, charges, commissioners,' by adding a new section thereto, to be known as section 1195*a*."

Second, an act approved April 15, 1905, entitled:

"An act entitled 'An act to amend chapter 12 of the Revised Statutes of Missouri, Revision of 1899, entitled "Corporations, private," by repealing section 1194 of said Revised Statutes, being part of article IV of said chapter concerning railroad classification, charges, commissioners, and to enact in lieu thereof the following new sections providing for the regulation of freight charges by railroads and the recovery of penalties for the violation thereof.' "

Third, an act approved February 27, 1907, entitled:

"An act to repeal sections 1191 and 1192 of chapter 12, article 4 Revised Statutes of Missouri, 1899, entitled 'Railroad classification, charges, commissioners,' by striking out sections 1191 and 1192 and enacting the following new sections in lieu thereof to be known as sections 1191 and 1192 and 1192*a*."

Fourth, an act approved March 19, 1907, entitled:

"An act to repeal an act of the 43rd general assembly, approved April 15, 1905, entitled 'An act to amend chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled "Corporations, private," by repealing section 1194 of said Revised Statutes, being part of article IV of said chapter, concerning railroad classification, charges, commissioners, and to enact in lieu thereof the following

new sections providing for the regulation of freight charges by railroads and the recovery of penalties for the violation thereof;' and to repeal an act of the 43rd general assembly, approved April 14, 1905, entitled 'An act to amend article IV, chapter 12, of the Revised Statutes of Missouri, 1899, entitled "Railroad classification, charges, commissioners," by adding a new section thereto, to *vised Statutes*
278 *of Missouri, 1899, entitled "Railroad Classifications, charges, commissioners," by adding a new section thereto, to* be known as section 1195a, fixing the charges for carrying undressed stone, crushed rock and building and paving brick,' and to enact in lieu thereof certain new sections, to be known as sections 1194, 1194*a*-1, 1194*b*-1 and 1194*c*-1, providing for the regulation of freight charges by railroads and prescribing the punishment for a violation thereof, which new sections shall read as follows:"

Fifth, an act approved March 19, 1907, entitled:

"An act to amend article 4, chapter 12, Revised Statutes of Missouri of 1899 by adding a new section thereto, to be known as section 1195*a*, and relating to freight charges and classifications."

3. The other defendants who are officers, and their successors, are likewise enjoined from enforcing or attempting to enforce any of said statutory enactments.

4. There is no evidence that either defendants Kemper, McKenzie, Dunlap or Urfer has threatened or intended to institute any action or proceeding against complainant as averred in the bill of complaint, and the said bill of complaint and the amendments and supplement is upon that ground as to said defendants in this paragraph named, dismissed. If, however, at any future time said defendants or either of them in this paragraph named, should take any action, or threaten or attempt to take any action under either or all of said statutes hereinbefore designated, then and in that case the complainant herein may apply to this court by supplemental bill or otherwise as it may be advised for further orders in that behalf.

5. It is further ordered, adjudged and decreed that the defendants, or any of them when the circumstances have changed so that the rates fixed as aforesaid shall yield to complainant reasonable compensation for the services aforesaid, may apply to this Court by supplemental bill or otherwise, as defendants or either of them may be advised, for further orders in their behalf.

And complainants may at any time by supplemental bill
279 or otherwise bring into the case any person, firm or corporation not expressly subject to this decree, who may attempt or threaten to take any action or institute any proceeding against complainant under any of said statutes hereinbefore designated, to the end that such orders or supplemental decrees may be entered as the facts and equity may warrant and require.

And the Court retains and reserves unto it, jurisdiction over all the parties hereto, and all subjects matter herein not now covered by the pleadings, to the end that such other and further orders and decrees may be made hereafter as may become necessary by reason of any changed condition as to the facts, equities or rights that may hereafter take place or arise.

6. The taxable costs of the case, including those covered by orders of the Court, heretofore made and hereafter made on motions to tax or retax, and including printing bill of Buxton-Skinner Stationery Company, shall be paid as follows, to-wit:

The one half by complainant and the other half by defendants to be recovered by execution to be issued by the Clerk of this Court upon application of any party in interest.

Done and ordered of record as of March 8th, 1909, in open court this March 22nd, 1909, at Kansas City, Missouri.

SMITH McPHERSON, *Judge.*

280 Afterwards, to-wit, on the 22nd day of March, 1909, a Motion to Modify Decree was filed. Said Motion is in words and figures as follows, to-wit:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY
vs.
HERBERT S. HADLEY et al.

And Equity Cases No. 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3006.

Motion.

Now comes complainant in each one of the above numbered cases and separately moves the court to modify and change its opinion and decree in these respects:

1. To strike from the opinion paragraph 4 thereof because it is based upon a misconception, and is an erroneous statement of the law.

2. To strike from paragraph 11 of the opinion these words:

"It being a legislatuve act, and not a judicial one, this Court can not fix rates. If it could, two and one-half cent passenger rates would be fixed for the stronger roads, and three for the others. But that is for the legislature acting itself with experts, such as the State employed in these case-, or through a Commission with like assistance."

This, for the reason that it was no part of the duty of the court to so decide, and it is directly in conflict with the express findings of fact. At a two and a half cent rate the returns would not be sufficient compensation.

3. To strike from paragraph 11 of the opinion these
281 words:

"Each party will pay the costs by such party made, except the compensation of the Master and stenographer. The half of those will be paid by complainants, and the other half by respondents."

This, for the reason that it is contrary to the rules and principles of law and equity and to good conscience.

4. To modify the decree so far as it taxes any costs against complainant, and to re-tax the same, for that there is no reason in equity or good conscience to tax same against it.

FRANK HAGERMAN,
Solicitor for Complainant.

282 Afterwards, to-wit, on the 3rd day of April, 1909, an Amended Motion to Modify Decree was filed. Said Amended Motion is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY,
vs.
HERBERT S. HADLEY et al.

And Equity Cases Nos. 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3006.

Amended Motion.

Now comes complainant in each and every one of the above entitled causes, and separately amends the motion heretofore filed to modify and change the opinion and decree in each and every one of the said causes, and thereupon further moves the court:

1. To set aside the said decree as entered March 22, 1909, as of March 8, 1909, so far as concerns those defendants who neither appeared nor demurred, nor adopted the answers of the railroad commissioners and attorney general, of which there are twenty-six in the eighteen cases. This, for the reason that the court erroneously made provisions for and against said defendants when they were not before it, and when complainants actually asked to dismiss as to them, to which, counsel for the said officers in open court consented. It is neither right nor just to enter a decree against persons not in court, nor can the court refuse complainant the right to dismiss as to them.

2. To set aside the portion of said decree dismissing the bill as to appearing and answering shippers, for that upon the findings and opinion, as well as upon the pleadings, the laws mentioned in paragraph 2 of the decree so entered as of March 8th, 1909, are confiscatory and void as to the shippers and passengers, and those classes of persons represented by them. Those of them who
283 defended adopted the answer and defense of the state officers. Each complainant is entitled to have the right involved duly established as against them. Because an injunction is found to be

unnecessary as to them is no reason for dismissing the bill, and it is inconsistent to enter such dismissal and then attempt to hold jurisdiction against them in the future as if there had been some adjudication as to their rights.

3. To set aside the provision of said decree as to costs for that the attempt in the decree to cure the error already rendered in taxing the costs, is erroneous. In the original opinion the decision was that each party should pay the costs by such party made, except the compensation of the master and stenographer, half of which should be paid by complainants and the other half by defendants. In open court it was announced that such rule was adopted solely because the defendants were state officers and the state might not appropriate the amount necessary to meet these costs. The supreme court has twice decided this is no excuse and no justification for taxing the costs against the other party. It was conceded by both parties that those shippers who adopted the defense of the state officers and were defended by them ought not to be compelled to pay any additional costs. This concession was agreed to by the court; yet, in the decree as now entered, this concession of both sides and the court is absolutely ignored. The only change made as to the costs is that one-half of all the costs shall be paid by each party. There is no legal excuse or justification to tax any of these costs to complainants; ample money has already been appropriated to the state officers for the purpose of paying the same, and even if it had not been so appropriated, this would have been no reason for making an order that complainant should pay costs.

FRANK HAGERMAN,
Solicitor for Complainants.

284 Afterwards, to-wit, on the 3rd day of April, 1909, a Notice was filed. Said Notice is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2988.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General, et al. Defendants.

And Equity cases Nos. 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004 and 3006.

Notice.

To Herbert S. Hadley, Attorney General, et al., Defendants, and their attorneys, of record:

You are hereby notified that complainants will, upon Saturday, April 3rd, 1909, in the federal court room at Kansas City Missouri,

call up before the Honorable Smith McPherson, Judge of said court, the motion to modify and change the opinion and decrees in the above entitled causes heretofore filed, copy of which was delivered to defendants, and also the amended motion, copy of which is herewith delivered to you.

FRANK HAGERMAN,
Solicitor for Complainants.

Received copy of above notice and of the motion and amended motion therein referred to this 27th day of March, 1909.

SANFORD B. LADD,
Solicitor for Defendants.

285 Afterwards, towit, on the 17th day of April, A. D. 1909, the same being a day of the regular November term of said Court, an amended final decree was filed and entered of record. Said amended final decree is in words and figures as follows:

In the Circuit Court of the United States, Western Division of the Western District of Missouri, at Kansas City.

No. 3006.

CHICAGO & ALTON RAILROAD COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General, et al., Defendants.

Amended Final Decree.

This case heretofore came on for hearing, the parties appearing by counsel, and was submitted upon the motion and amended motion to change and modify the decree of March 8, 1909, and the court being fully advised in the premises, now upon this 17th day of April, 1909, amends the said decree heretofore entered so that same shall read as follows:

The above entitled cause this March 8th, 1909, comes on for final decree upon the evidence and stipulations upon file and of record herein, the case having heretofore been fully argued and fully submitted and taken under advisement. And now at this time the court being fully advised in the premises, the parties appearing by their respective counsel, for reasons stated in an opinion by the trial judge and findings of fact signed and filed herein, orders, adjudges and decrees:

1. The maximum freight laws of Missouri of 1905 and 1907, and the passenger rate law of 1907, mentioned in para-
286 graph 2 hereof, and set forth in the original bill and amendments and supplements thereto, are unreasonable and confiscatory, do not afford the complainant any fair or reasonable return upon the value of its property, and to comply therewith would take the property of complainant without due process of law. None of the provisions thereof should or can be rightfully enforced against

complainant, its officers, agents or employés. A finding of fact has been prepared and filed, and is hereby referred to as if made part hereof.

2. Defendants Elliott W. Major, Attorney General of the State of Missouri, John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad Commissioners of the state of Missouri, and each of them, their agents or employés and successors, are hereby enjoined from enforcing, or attempting, directly or indirectly, by suit or in any other manner whatsoever, to enforce against complainant, its officers, agents, employés or servants, any of the provisions of, or penalties provided for in the following acts of the legislature of the state of Missouri:

First, an act approved April 14, 1905, entitled:

"An Act to amend article IV, chapter 12 of the Revised Statutes of Missouri of 1899, entitled 'Railroad classification, charged, commissioners,' by adding a new section thereto, to be known as section 1195*a*."

Second, an act approved April 15, 1905, entitled:

"An Act, entitled 'An Act to amend chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled "Corporations, private," by repealing section 1194 of said Revised Statutes, being part of article IV of said chapter concerning railroad classification—charges—commissioners, and to enact in lieu thereof the following new sections providing for the regulation of freight charges by railroads and the recovery of penalties for the violation thereof.' "

Third, an act approved February 27, 1907, entitled:

"An Act to repeal sections 1191 and 1192 of chapter 12, article 4, Revised Statutes of Missouri, 1899, entitled 'Railroad classification—charges—commissioners,' by striking out sections 1191 and 1192 and enacting the following new sections in lieu thereof, to be known as sections 1191 and 1192 and 1192*a*."

Fourth, an act approved March 19, 1907, entitled:

"An act to repeal an act of the 43rd general assembly, ap-
287 proved April 15, 1905, entitled 'An act to amend chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled "Corporations, private," by repealing section 1194 of said Revised Statutes, being part of article IV of said chapter, concerning railroad classification, charges, commissioners, and to enact in lieu thereof the following new sections providing for the regulation of freight charges by railroads, and the recovery of penalties for the violation thereof,' and to repeal an act of the 43rd general assembly, approved April 14, 1905, entitled 'An act to amend Article IV, chapter 12 of the Revised Statutes of Missouri, 1899, entitled "Railroad classifications, charges, commissioners," by adding a new section thereto, to be known as section 1195*a*, fixing the charges for carrying undressed stone, crushed rock and building or paving brick,' and to enact in lieu thereof certain new sections, to be known as sections 1194, 1194*a*-1 1194*b*-1 and 1194*c*-1, providing for the regulation of freight charges by railroads and prescribing the punishment for a violation thereof, which new sections shall read as follows:"

Fifth, an act approved March 19, 1907, entitled:

"An act to amend article 4, chapter 12, Revised Statutes of Missouri of 1899, by adding a new section thereto, to be known as section 1195*a*, and relating to freight charges and classification."

3. The other defendants who are officers, and their successors, are likewise enjoined from enforcing or attempting to enforce any of said statutory enactments.

4. There is no evidence that either defendants, Kemper, McKenzie, Dunlap or Urfer has threatened or intended to institute any action or proceeding against complainant as averred in the bill of complaint, but they have adopted the answers of the Railroad Commissioners and Attorney General. The said bill of complaint and the amendments and supplement to the extent and so far only as it seeks present injunctive relief against them, is upon that ground as to said defendants in this paragraph named, dismissed without prejudice. If, however, at any future time said defendants or either of them in this paragraph named, should take any action, or threaten or attempt to take any action under either or all of said statutes hereinbefore designated, then and in that case the complainant herein may apply to this court by supplemental bill or otherwise as it may be advised, for further orders in that behalf.

288 5. It is further ordered, adjudged and decreed that the defendants, or any of them, when the circumstances have changed so that the rates fixed as aforesaid shall yield to complainant reasonable compensation for the services aforesaid, may apply to this court by supplemental bill or otherwise, as defendants or either of them may be advised, for further orders in their behalf.

And complainant may at any time by supplemental bill or otherwise bring into the case any person, firm or corporation not expressly subject to this decree, who may attempt or threaten to take any action or institute any proceedings against complainant under any of said statutes hereinbefore designated, to the end that such orders or supplemental decree may be entered as the facts and equity may warrant and require.

And the court retains and reserves unto it, jurisdiction over all the parties hereto, and all subjects matter herein, not now covered by the pleadings, to the end that such other and further orders and decrees may be made hereafter as may become necessary by reason of any changed condition as to the facts, equities or rights that may hereafter take place or arise.

6. The taxable costs of the case including those covered by orders of the court, heretofore made or hereafter made on motion to tax or retax, and including printing bill of Buxton-Skinner Stationery Company shall be paid as follows, to-wit: The one-half by complainant and the other half by defendants who are Railroad Commissioners and the Attorney General, to be recovered by execution to be issued by the clerk of this court upon application of any party in interest.

7. Some of the defendants having announced their intention to appeal, it is now ordered that no appeal shall supersede the injunctive

portions of this decree, but pending any such appeal the
289 complainants shall be permitted to charge the rates permitted by sections 1191 and 1192 of the Revised Statutes of Missouri, 1899, the same as if the Passenger Rate Act approved February 27, 1907, and herein held to be confiscatory, had not been passed. Complainant having by order herein of June 17, 1907, been required to temporarily adopt the rate fixed by said Passenger Rate Act, shall be and is hereby permitted, free from the interference of the parties and classes represented by them, who are hereby ordered not to interfere, to restore and put in force the rates authorized by said sections 1191 and 1192, this court reserving power and jurisdiction from time to time to enforce, change and modify this paragraph of this decree, as well as to protect the complainant in being restored to the right of which said order temporarily deprived it.

8. This decree shall be binding upon and enforceable against the said defendants, not dismissed, their assistants, agents, attorneys and employés, and any class or classes of persons or officers represented by them.

SMITH McPHERSON, *Judge.*

290 Afterwards, to-wit, on the 6th day of March, 1911, a declination to join in appeal was filed. Said declination is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3006.

THE CHICAGO AND ALTON RAILWAY COMPANY, Complainants,
vs.
JOHN A. KNOTT, H. R. OGLESBY, and FRANK A. WIGHTMAN, Railroad and Warehouse Commissioners; Elliott W. Major, Attorney General of the State of Missouri; Joseph M. Patterson, Charles E. Moss, and George J. Dodd, Judges of the County Court of Jackson County, Missouri; Arthur C. Warner, Treasurer of Jackson County, Missouri; William T. Kemper and Alexander McKenzie, and Lee Dunlap, and Fred C. Urfer, Defendants.

To Joseph M. Patterson, Charles E. Moss and George J. Dodd, and Hugh C. Gilbert, Edward L. Martin and Edward E. Axline, as successors respectively to said Joseph M. Patterson, Charles E. Moss and George J. Dodd, in the offices of judges of the County Court of said Jackson County; Arthur C. Warner and Overton H. Gentry, Jr., as successor to said Arthur C. Warner in the office of Treasurer of said Jackson County; William T. Kemper, Alexander McKenzie, Lee Dunlap and Fred C. Urfer:

Each of you is hereby invited to join with the undersigned in a petition for an appeal in the above entitled cause to the Supreme Court of the United States, to reverse the decree in the above entitled

cause, rendered on the 8th day of March, 1909, as amended by the decree herein entered on the 17th day of April, 1909, or you will be deemed to have acquiesced in said decree as amended, and we shall present said petition for an appeal and prosecute said appeal without joining you as a party.

291 Said petition for an appeal will be presented to the said Circuit Court for allowance, at the court room of said court, in Kansas City, Jackson County, on Monday, the 6th day of March, at 9 o'clock A. M., or as soon thereafter as said petition can be heard.

ELLIOTT W. MAJOR,
Attorney General of the State of Missouri;
JOHN A. KNOTT,
H. R. OGLESBY,
FRANK A. WIGHTMAN,
Railroad and Warehouse Commissioners, Defendants.
By ELLIOTT W. MAJOR,
Attorney General;
JOHN M. ATKINSON,
Assistant Attorney General;
SANFORD B. LADD,
Counsel for Defendants.

Service of the above is accepted this 27th day of February, 1911, and we, the undersigned, severally decline to join in said petition for an appeal.

Witness- to Signature-:

CALEB S. MONROE.	JOSEPH M. PATTERSON.
CALEB S. MONROE.	CHARLES E. MOSS.
CALEB S. MONROE.	W. S. KEMPER.
CALEB S. MONROE.	FRED C. URFER.
PORTER B. GODDARD.	H. C. GILBERT.
PORTER B. GODDARD.	E. L. MARTIN.
PORTER B. GODDARD.	E. E. AXLINE.
CALEB S. MONROE.	ALEXANDER McKENZIE.
CALEB S. MONROE.	LEE DUNLAP.
CALEB S. MONROE.	GEORGE J. DODD.
CALEB S. MONROE.	O. H. GENTRY, JR.
CALEB S. MONROE.	ARTHUR C. WARNER.

292 Afterwards, to-wit, on the 6th day of March, 1911, defendants' Assignment of Errors was filed. Said Assignment of Errors is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3006.

THE CHICAGO AND ALTON RAILWAY COMPANY, Complainant,
vs.
JOHN A. KNOTT, H. R. OGLESBY, and FRANK A. WIGHTMAN, Railroad and Warehouse Commissioners; Elliott W. Major, Attorney General of the State of Missouri; Joseph M. Patterson, Charles E. Moss, and George J. Dodd, Judges of the County Court of Jackson County, Missouri; Arthur C. Warner, Treasurer of Jackson County, Missouri; William T. Kemper, and Alexander McKenzie, Defendants.

Assignment of Errors.

Now come John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad and Warehouse Commissioners, and Elliott W. Major, Attorney General of the State of Missouri, defendants in the above entitled cause, and aver that in the record and proceedings and decree in the above entitled cause, there is manifest error, in this:

1. The court erred in adjudging and decreeing, by its amended decree, that the maximum freight rate laws of Missouri of 1905 and 1907 are unreasonable and confiscatory and do not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the property of complainant without due process of law; because the evidence shows that said laws are reasonable and compensatory, and that they do afford the complainant a fair and reasonable return upon the value of its property; and upon the evidence in the case, the complainant's bill and its amended and supplemental bill, in so far as they sought for any relief against, or brought into question the validity of said maximum freight rate laws, should have been dismissed.

2. The court erred in its amended decree in thereby adjudging and decreeing that the defendant, Elliott W. Major, Attorney General of the State of Missouri, be enjoined from enforcing, or attempting, directly or indirectly, by suit or in any other manner whatsoever, to enforce against the complainant, its officers, agents, employés or servants, any of the provisions of or penalties provided for in the acts of the Legislature of the State of Missouri, mentioned in said decree, and approved, respectively, April 14, 1905, April 15, 1905, and two approved March 19, 1907.

3. The court erred in its amended decree in thereby adjudging and decreeing that the defendants, John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad Commissioners of the
293 State of Missouri, be enjoined from enforcing, or attempting directly or indirectly, by suit or in any other manner whatsoever, to enforce against the complainant, its officers, agents, employés or servants, any of the provisions of or penalties provided for in the acts of the Legislature of the State of Missouri, mentioned

in said decree, and approved, respectively, April 14, 1905, April 15, 1905, and two approved March 19, 1907.

4. The court erred in decreeing that the maximum freight rate laws of 1905 and 1907 are unreasonable and confiscatory, do not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the property of complainant without due process of law; because the evidence in the case is not sufficient to overcome the presumption in favor of the validity of those laws and the evidence does not establish clearly and beyond all doubt their invalidity.

5. The court erred in decreeing that the freight rate laws of 1905 and 1907 were confiscatory and therefore deprived the complainant of its property without due process of law, because the burden of proof upon that issue was upon the complainant, and that burden was not sustained. The exact gross revenue from intrastate business for any given period was easy of ascertainment. The ascertainment of the expense of earning that revenue was difficult by reason of the fact that interstate and intrastate freight were transported in the same trains and often in the same cars. It was in the power of the complainant, at any time during the litigation, to have determined, by actual observation and investigation for a period which should be typical, the volume of freight, both intrastate and interstate, carried on each of its trains within the State of Missouri during such period, the revenue from each class of freight and also, quite closely, the expense of moving each of said trains within the State, and to have exhibited to the court the result of such observation and investigation. The court would thus have been enabled to determine approximately how much of the total expense of moving said trains should be assigned to the intrastate and interstate freight, respectively, contained in them.

No evidence of this character was adduced, no tests of this kind made. Upon this question the court was left to reach a conclusion upon the opinions of witnesses. No decree should have been rendered for complainant until this evidence of actual facts of vital importance, which was at its command, had been adduced to the court.

6. The court erred in adjudging and decreeing in its amended final decree herein that the maximum freight rate laws of Missouri, of 1905 and 1907, were unreasonable and confiscatory, and did not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the property of complainant without due process of law; and that none of the provisions thereof should or can be rightfully enforced against the complainant, its officers, agents, or employés.

Because it appears from the evidence that a very large part of the intrastate freight transported by the complainant is not governed as to the rates to be charged therefor by the Acts of 1905 and the Acts of 1907, but that the maximum rates for the transportation thereof are fixed by the State Board of Railroad and Warehouse Commissioners, by authority of law, conferring upon them that power. It further appears from the evidence, that the complainant

has not been charging for the transportation of such freight the rates so fixed by the State Board of Railroad and Warehouse Commissioners, but rates less than those so fixed. But the com-
294 plainant failed to show and made no effort to show what its revenue from the intrastate freight business would have been had it charged the rates allowed by the State Board of Railroad and Warehouse Commissioners for such portion of the freight carried by it, as was not governed by the Acts of 1905 and 1907; and therefore there is no evidence in the case that if the complainant had charged such rates and had also complied with the Acts of 1905 and 1907, it would not have received a revenue from its intrastate freight business which would have afforded it a fair, adequate and just return for doing such business. If it had charged what it might, according to the law of the State, have charged for the transportation of such freight, its receipts for doing its entire intrastate freight business might, for any evidence which appears in the case, have been sufficient to afford it all the net profits to which it was entitled.

7. The court erred in adjudging and decreeing in the amended final decree that the maximum freight rate laws of Missouri of 1905 and 1907 are unreasonable and confiscatory and do not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the property of complainant without due process of law, because the said acts of 1905 took effect on the 16th day of June, 1905, and the original bill herein, alleging the unconstitutionality of said Acts of 1905, and seeking to enjoin their enforcement, was filed by the complainant on said 16th day of June, 1905, and on the same day a restraining order was issued herein, enjoining the defendants, the Railroad and Warehouse Commissioners, "from taking or making out or printing or delivering any schedule of rates for complainant, containing the maximum rates fixed by said Acts." And on the 12th day of July, 1905, the court continued said restraining order as a temporary injunction, which was in force as against said defendants from said date until the final decree was entered. Therefore, at the time of the filing of said bill and the issue of said restraining order, the defendants, said Railroad and Warehouse Commissioners, because the law had not yet taken effect, had enjoyed no opportunity to revise the then existing schedule of rates.

The said defendants, Railroad and Warehouse Commissioners, had authority, under the law, to fix maximum rates for the transportation of that portion of the intrastate freight for which rates were not fixed by the Acts of 1905, which said portion was very large in volume and produced to the complainant much the larger part of its entire revenue for the transportation of intrastate freight. The said Railroad and Warehouse Commissioners might, if they had not been prevented by the restraining order and temporary injunction herein, have fixed such rates for the transportation of said portion of such intrastate freight, and made schedules therefor, which schedules should also have embraced the maximum rates for the commodities mentioned in the said Acts of 1905, as would have permitted the

complainant, while observing said schedules and said acts of 1905, to have derived from its intrastate freight business, as a whole, a gross revenue sufficient to have yielded to it a fair, just and adequate net return or profit from the doing of its said intrastate freight business. The complainant should have deferred the institution of this suit until the said Board of Railroad and Warehouse Commissioners had fixed rates and adopted schedules so low as to disable the complainant from realizing an adequate revenue upon its entire intrastate freight business.

Therefore, the action was prematurely brought; and for
295 this reason no restraining order or temporary injunction or final decree should have been rendered as to either of said maximum freight rate Acts.

8. The court erred in adjudging and decreeing by its amended final decree that the passenger rate law of 1907, approved February 27, 1907, is unreasonable and confiscatory and does not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the property of complainant without due process of law; because, upon the evidence in the case, said passenger rate law is reasonable and compensatory and does afford the complainant a fair and reasonable return upon the value of its property; and upon the evidence in the case, the complainant's bill, and its amended and supplemental bills, in so far as they sought for any relief against or brought into question the validity of said passenger rate law of 1907, should have been dismissed.

9. The court erred in decreeing that the passenger rate law of 1907 is unreasonable and confiscatory, does not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the property of complainant without due process of law; because the evidence in the case is not sufficient to overcome the presumption in favor of the validity of the law, and the evidence does not establish clearly and beyond all doubt its invalidity.

10. The court erred in its amended decree in thereby adjudging and decreeing that the defendant, Elliott W. Major, Attorney General of the State of Missouri, be enjoined from enforcing, or attempting, directly or indirectly, by suit or in any other manner whatsoever, to enforce against the complainant, its officers, agents, employés or servants, any of the provisions of or penalties provided for in said Act of the Legislature of the State of Missouri, mentioned in said decree and approved February 27, 1907.

11. The court erred in its amended decree in thereby adjudging and decreeing that the defendants, John A. Knott, H. R. Oglesby, and Frank A. Wightman, Railroad Commissioners of the State of Missouri, be enjoined from enforcing, or attempting, directly or indirectly, by suit or in any other manner whatsoever, to enforce against the complainant, its officers, agents employès or servants, any of the provisions of or penalties provided for in said act of the Legislature of the State of Missouri, mentioned in said decree and approved February 27, 1907.

12. The defendants, John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad and Warehouse Commissioners, for themselves assert that the court erred in that part of its decree whereby it enjoined them from enforcing or attempting, directly or indirectly, to enforce against the complainant, its officers, agents employés or servants, any of the provisions of or the penalties provided for in the passenger rate Act, approved February 27, 1907; because, under the laws of the State of Missouri, they have no functions of any kind to perform in relation to rates for the carriage of passengers, nor do such laws vest in them any authority, or devolve upon them any duties to be performed by them, directly or indirectly, to require or compel obedience to any laws relating to rates for the carriage of passengers.

13. The court erred in permitting the complainant, against the objection of the defendants to file herein its alleged amended and supplemental bill of complainant and the amendment thereto, because the original bill was based upon the Acts of the 43rd
296 General Assembly of the State of Missouri, approved April 14, 1905, and April 15, 1905, which fixed maximum rates for intrastate freight and the alleged amended and supplemental bill and the amendment thereto is based upon the Acts of the 44th General Assembly of the State of Missouri, approved March 19, 1907, which repealed said Acts of 1905 and established a new maximum of rates for intrastate freight, and the Act of the 44th General Assembly of the State of Missouri, approved March 19, 1907, fixing rates for the transportation of fruit, and the Act of the 44th General Assembly of the State of Missouri, approved February 27, 1907, fixing a maximum schedule of rates for passenger traffic, and the matters set forth in the said alleged amended and supplemental bill of complaint and the amendment thereto, are not germane to or supplemental of the original bill of complaint herein.

14. The court erred in permitting the complainant, against the objection of defendants, to file the alleged amended and supplemental bill of complaint and the amendment thereto, so far as the same relates to the Act of the 44th General Assembly of the State of Missouri, approved February 27, 1907, fixing a maximum schedule of passenger rates, because the matters set forth in said alleged amended and supplemental bill, and the amendment thereto, relative to said Act of the 44th General Assembly of the State of Missouri, fixing a maximum schedule of passenger rates, are not germane to or supplemental of any of the matters alleged in the original bill.

15. The court erred in overruling the demurrer of the defendants to the alleged amended and supplemental bill of complaint and the amendment thereto, because the matters contained in said alleged amended and supplemental bill of complaint and the amendment thereto, are not germane to or supplemental of the original bill, and if they constitute any cause of action whatever, constitute a new, original and independent cause of action not connected with or dependent upon the original cause of action, and one that accrued, if at all, long after the original bill was filed.

16. The court erred in overruling the demurrer of defendants to

the portions and paragraphs of the alleged amended and supplemental bill of complaint and the amendment thereto, relative to the Act of the 44th General Assembly of the State of Missouri, fixing a maximum schedule of passenger rates, because such portions and paragraphs of the alleged amended and supplemental bill of complaint and the amendment thereto, are not germane to or supplemental of the original bill of complaint, and constitute, if anything, a new and independent cause of action not connected with or dependent upon the original cause of action, and one that accrued, if at all, long after the original bill was filed.

17. The court erred in granting to the complainant the relief asked, with respect to the Act of the 44th General Assembly of the State of Missouri, fixing a maximum schedule of passenger rates, because *is* was not authorized to take jurisdiction of that matter upon a bill of complaint filed as an amendment or supplement of a bill based upon Acts of the 43rd General Assembly of the State of Missouri, which were confined to freight rates and had been repealed.

18. The court erred in enjoining the defendant, Elliott W. Major, Attorney-General of the State of Missouri, from prosecuting the suits for injunctive relief, instituted by his predecessor in office, Herbert S. Hadley, in the State Court of Missouri, against the complainant prior to the filing of the alleged amended and supplemental bill of complaint herein.

297 19. The court erred in finding that the expense of doing the intrastate business over the interstate is greater for carrying freight by at least fifty per cent. By this language in the finding is meant at least fifty per cent more in proportion to revenue, while upon the weight of credible evidence in the case, the expense of doing the intrastate freight business over the interstate is not greater than thirty per cent per ton per mile.

20. The court erred in finding that the evidence shows that the cost of doing the intrastate freight business, as between intrastate and interstate, apportioned upon the revenue basis with added extra cost, brings a result which is fair, representative or just.

21. The court erred in finding that aside from the revenue basis, the evidence shows that the amount ascertained by the court in any of the cases, as the expense and extra cost of doing the intrastate freight business, is fair or justly represents the expense of doing the intrastate freight business.

The appellants assert, on the contrary, that aside from the revenue basis, there is no evidence in the case from which the result as found by the court as to the expense of doing the intrastate freight business can be reached.

22. The court erred in finding that the proper method of dividing the total expense of doing complainant's freight business in the State and assigning the proper proportion thereof to the intrastate freight business, was by the application of the revenue theory, and in accordance with that theory, dividing the total expense between the two classes of business in proportion to the revenue derived from each, and then to the portion thus assigned to the intrastate freight business, adding such an amount as would represent fifty per cent

greater expense in proportion to revenue for the intrastate than for the interstate business. The consequence was to burden the intrastate freight business with a portion of the total expense very largely in excess of its just proportion and a much greater share thereof than was actually incurred in doing that business.

The court should have found that the proper method of ascertaining that part of the total State freight expense justly assignable to the intrastate freight, was by determining, as closely as possible, the average cost per ton mile of handling and transporting intrastate and interstate freight, respectively. The average cost per ton per mile deducted from the average revenue per ton per mile (which is easily ascertainable from the evidence) would have produced the net revenue per ton per mile derived from each class of freight. The court erred in its finding which rejected this method, by the application of which the evidence in the case shows that complainant might have complied with the freight rate Acts of 1905 and 1907, and would still have derived from the doing of its intrastate business an adequate profit fully equivalent to any net return to which it is by law entitled.

23. The court erred in finding that the sum total of the extra cost of doing the intrastate freight business would not be changed if ascertained according to the ton mile theory.

On the contrary, the evidence shows clearly that if the expense of doing the intrastate freight business be ascertained by the application of the ton mile theory, that expense would be found to be very much less than the amount found by the court; so much less as to leave to the complainant a reasonable net return for doing the business.

24. The court erred in finding that the revenue basis is the
298 proper method of ascertaining the expense of the intrastate passenger traffic. In adopting that method the court divided the total expense of the passenger business done in the State between the intrastate and the interstate business by assigning to each class such a proportion of such total expense as the revenue from each class of business bore to the total revenue from the State passenger traffic, and then adding to the proportion thus ascertained for the intrastate, such an amount as would represent twenty-five per cent greater expense in proportion to revenue for the intrastate than for the interstate business. The result of the application of this method was to charge the intrastate business with a much larger share of the total expense than was actually incurred in doing that business.

The true method is to ascertain the average revenue and expense of carrying a passenger one mile, in each class of business, and the difference would be the net revenue or deficit on each passenger mile.

The evidence shows that the net revenue per passenger mile is greater in the intrastate than in the interstate business, and that the net revenue from its intrastate passenger business, if charged for at the rates fixed by the Act of February 27, 1907, affords to the complainant a reasonable and adequate return for doing the business.

25. The court erred in finding that the expense of doing the State passenger business over the intrastate is at least twenty-five

per cent; this language meaning twenty-five per cent more in proportion to revenue. The evidence in the case does not support this finding.

26. The court erred in adopting the tables of earnings and expenses of the complainant, set forth in the finding of facts, because the said tables of expenses and of earnings did not cover any fairly representative period of operations of the complainant, and because said tables of expenses and earnings are not supported by any competent evidence in the case.

27. The court erred in finding that the short line between two competitive points, necessarily fixes the rate. If the rate is thus fixed it is because the complainant and the other railroad companies of the State have agreed with each other that it shall be so fixed.

28. The court erred in finding that it was conceded by the experts that the companies accurately and honestly kept their books, showing the facts set out in the findings of the court. The books of the companies did not show the facts set out in said findings, nor did the experts for the State concede that they did.

29. The court erred in finding (as stated in the opinion), that evidence in the case tended to show that a large number of men have been discharged from the service of the railroad companies by reason of the reduction of the rates. Not a reduction in rates, but a general depression in business and the want of business to keep the men employed, was the cause of their discharge.

30. The court erred in finding that the value of the complainant's franchise, included in the total valuation of its property as fixed by the State Board of Equalization, was so small a per cent of such total valuation as to make no appreciable difference in the result of the case.

On the contrary, the evidence shows that the value of the franchise was a substantial part of such total valuation.

31. The court erred in finding that if the value of complainant's franchise were altogether omitted from the value of its property, it could not have obtained from the operation of its property, or from the doing of the intrastate freight business, the return to which it is entitled.

299 32. The court erred in finding that the complainant was entitled to a return upon the value of its franchise.

Wherefore, these defendants pray that the said amended final decree be reversed, and that said court may be directed to enter a decree dismissing the complainant's bill, its amended and supplemental bill, and the amendment thereto.

ELLIOTT W. MAJOR,
Attorney General;
JOHN M. ATKINSON,
Assistant Attorney General;
SANFORD B. LADD,
Solicitors for Defendants, John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad and Warehouse Commissioners, and Elliott W. Major, Attorney General of the State of Missouri.

300 Afterwards, to-wit, on the 6th day of March, 1911, Defendants' Petition for Appeal was filed. Said Petition for Appeal is in words and figures as follows:

301 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3006.

THE CHICAGO AND ALTON RAILWAY COMPANY, Complainant,

vs.

JOHN A. KNOTT, H. R. OGLESBY, and FRANK A. WIGHTMAN, Railroad and Warehouse Commissioners; Elliott W. Major, Attorney General of the State of Missouri; Joseph M. Patterson, Charles E. Moss and George J. Dodd, Judges of the County Court of Jackson County, Missouri; Arthur C. Warner, Treasurer of Jackson County, Missouri; William T. Kemper and Alexander McKenzie and Lee Dunlap and Fred C. Urfer, Defendants.

The above named defendants, John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad and Warehouse Commissioners, and Elliott W. Major, Attorney General of the State of Missouri, conceiving themselves aggrieved by the decree rendered as of the 8th day of March A. D. 1909 but signed, filed and entered on the 22nd day of March, A. D. 1909, as amended by the decree entered on the 17th day of April, A. D. 1909, in the above entitled cause do hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and pray that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

And said defendants further show to the court that they have, in writing, notified the other defendants in said cause, to-wit:

Joseph M. [illegible]tterson, Charles E. Moss and George J. Dodd and Hugh C. Gilbert, Edward L. Martin and Edward E. Axline as successors respectively to said Joseph M. Patterson, Charles E. Moss and George J. Dodd in the offices of Judges of the County Court, of said Jackson County, Arthur C. Warner and Overton H. Gentry, Jr., as successor to said Arthur C. Warner in the office of Treasurer of said Jackson County, William T. Kemper, Alexander McKenzie, Lee Dunlap and Fred C. Urfer of their intention to present this petition for an appeal, and have, in writing, invited said other defendants to join with them in such petition for an appeal, and that all of said other defendants have, in writing, accepted service of said notices and invitations, and have, also in writing, severally declined to join in said petition for an appeal, which said notices and invita-

tions, acceptances and declinations are now presented to the court and filed herewith.

ELLIOTT W. MAJOR,
Attorney General;
JOHN M. ATKINSON,
Assistant Attorney General;
SANFORD B. LADD,
Counsel for John A. Knott, H. R. Oglesby, and Frank A. Wightman, Railroad and Warehouse Commissioners, and Elliott W. Major, Attorney General of the State of Missouri.

Dated this 6th day of March, A. D. 1911.

The foregoing petition for appeal is allowed. Dated March 6th 1911.

(Signed) SMITH McPHERSON, *Judge.*

302 Afterwards, to-wit, on the 6th day of March, 1911, a Bond for Appeal was approved and filed. Said Bond is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3006.

THE CHICAGO AND ALTON RAILWAY COMPANY, Complainant,
vs.
JOHN A. KNOTT, H. R. OGLESBY and FRANK A. WIGHTMAN, Railroad and Warehouse Commissioners; Elliott W. Major, Attorney General of the State of Missouri; Joseph M. Patterson, Charles E. Moss and George J. Dodd, Judges of the County Court of Jackson County, Missouri; Arthur C. Warner, Treasurer of Jackson County, Missouri; William T. Kemper and Alexander McKenzie and Lee Dunlap and Fred C. Urfer, Defendants.

Know all men by these presents: That we, John A. Knott, H. R. Oglesby, Frank A. Wightman and Elliott W. Major, as principals, and J. W. Perry and W. H. Seeger, as sureties, are held and firmly bound unto The Chicago and Alton Railway Company, in the sum of One Thousand Dollars ($1000) to be paid unto the said The Chicago and Alton Railway Company, its successors or assigns; to which said payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 6th day of March, A. D. 1911.

This obligation is upon this condition:

303 Whereas, the above named John A. Knott, H. R. Oglesby, — to the Supreme Court of the United States to reverse the decree rendered, and entered in the above entitled cause by

the Circuit Court of the United States for the Western Division of the Western District of Missouri;

Now if the above named John A. Knott, H. R. Oglesby, Frank A. Wightman and Elliott W. Major, shall prosecute their said appeal to effect, and answer all costs if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and virtue.

JOHN A. KNOTT. [SEAL]
H. R. OGLESBY. [SEAL]
FRANK A. WIGHTMAN. [SEAL]
J. W. PERRY. [SEAL]
W. H. SEEGER. [SEAL]
ELLIOTT W. MAJOR. [SEAL]

The above bond is hereby approved and ordered to be filed and made a part of the record.

(Signed) SMITH McPHERSON, *Judge.*

304 Afterwards, to-wit, on the 6th day of March, 1911, the following Order Allowing Appeal to defendants was filed and entered of record, to-wit:

305 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3006.

THE CHICAGO AND ALTON RAILWAY COMPANY, Complainant,

v.

JOHN A. KNOTT, H. R. OGLESBY and FRANK A. WIGHTMAN, Railroad and Warehouse Commissioners; Elliott W. Major, Attorney General of the State of Missouri; Joseph M. Patterson, Charles E. Moss and George J. Dodd, Judges of the County Court of Jackson County, Missouri; Arthur C. Warner, Treasurer of Jackson County, Missouri; William T. Kemper and Alexander McKenzie, Lee Dunlap and Fred C. Urfer, Defendants.

Now at this day come the defendants, John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad and Warehouse Commissioners, and Elliott W. Major, Attorney General of the State of Missouri, and present their petition for an appeal to the Supreme Court of the United States from the final decree rendered herein, and also present an assignment of errors accompanying said petition, and at the same time make it appear to the satisfaction of the court that they have, in writing, notified the other defendants in this cause, that is to say, Joseph M. Patterson, Charles E. Moss and George J. Dodd, and Hugh C. Gilbert, Edward L. Martin and Edward E. Axline, as successors respectively to said Joseph M. Patterson, Charles E. Moss and George J. Dodd, in the offices of judges of the County Court of said Jackson County, Arthur C. Warner and Overton H. Gentry, Jr., as successors to said Arthur C. Warner, in

the office of Treasurer of said Jackson County, William T. Kemper, Alexander McKenzie, Lee Dunlap and Fred C. Urfer, of their (the said petitioners') intention to present said petition for an appeal, and have, also in writing, invited said other defendants to join with them, the said petitioners, in said petition for an appeal, and that all of said other defendants have, in writing, accepted service of said notices and invitations, and have, also in writing, severally declined to join in said petition for an appeal, which said notices, invitations, acceptances and declinations are now, by said petitioners, presented to the court; and it is thereupon ordered by the court that said petition for an appeal, said assignment of errors, said written notices, invitiations, acceptances and declinations be filed and made a part of the record in this cause, and it is further ordered that the interests of the defendants so presenting said petition for an appeal be severed in said appeal from the interests of the said other defendants herein, and upon consideration of said petition, the court now allows the same, and to the said defendants, John A. Knott, H. R. Oglesby, Frank A. Wightman and Elliott W. Major, an appeal to the Supreme Court of the United States from the final decree rendered in this cause in accordance with the prayer of said petition. And at the same time the said defendants present their bond for an appeal in the sum of One Thousand Dollars ($1,000) with J. W. Perry and W. H. Seeger, as sureties thereon, which said bond is now approved by the court, and it is ordered that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings herein be transmitted to the said Supreme Court of the United States.

Dated Kansas City, Missouri, March 6, 1911.

(Signed) SMITH McPHERSON, *Judge.*

306 Afterwards, to-wit, on the 6th day of March, 1911, an assignment of errors was filed. Said assignment of errors is in words and figures as follows, to-wit:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3006.

CHICAGO & ALTON RAILROAD COMPANY, Complainant,
vs.
JOHN A. KNOTT, H. R. OGLESBY and FRANK A. WIGHTMAN, Railroad Commissioners, et al., Defendants.

Assignment of Errors.

Now comes complainant and respectfully shows that the court in the proceedings and decree in the above entitled cause committed manifest error in each of the following respects:

1. In rendering and entering that portion of paragraph 5 of the original and amended decree reading:

"It is further ordered, adjudged and decreed that the defendants, or any of them, when the circumstances have changed so that the rates fixed as aforesaid shall yield to complainant reasonable compensation for the services aforesaid, may apply to this court by supplemental bill or otherwise, as defendants or either of them may be advised, for further orders in their behalf."

2. In rendering and entering paragraph 6 of the amended final decree reading:

"The taxable costs of the case including those covered by orders of the court, heretofore made or hereafter made on motion to tax or retax, and including printing bill of Buxton-Skinner Stationery Company shall be paid as follows, to-wit: The one-half by
307 complainant and the other half by defendants who are Railroad Commissioners and the Attorney General, to be recovered by execution to be issued by the clerk of this court upon application of any party in interest."

3. In not decreeing to be regulation of commerce among the states and invalid, of no force, and contrary to the provisions of section 8, article 1 of the constitution of the United States, each of the acts of the legislature of Missouri mentioned in paragraph 2 of the amended final decree; the purpose of this assignment being to make it a separate assignment of error as to each of said acts, the same as if it were separately written out and applied to each act.

4. In not decreeing that the rights, privileges and immunities of complainant were abridged, that complainant was denied the equal protection of the law and deprived of its property without due process of law, all contrary to the provisions of the fourteenth amendment to the constitution of the United States, by the state making and enforcing each of the legislative acts mentioned in paragraph 2 of the amended final decree; the purpose and intent hereof being to separately assign this error as to each one of said acts the same as if so separately written.

5. In holding that neither the freight act approved March 19, 1907, nor that approved April 14, 1905, nor that approved April 15, 1905, nor the passenger act approved February 27, 1907, nor the enforcement of either of them, directly affected interstate commerce.

6. In holding that neither the freight act approved March 19, 1907, nor that approved April 14, 1905, nor that approved April 15, 1905, nor the passenger act approved February 27, 1907, was discriminatory against complainant, or, as to it, violative of the fourteenth amendment to the constitution of the United States when the act was upon its face general in its terms, applicable
308 to all companies in the state, and the findings show that it is confiscatory as to each of the other companies in the state and as to complainant's competitors.

7. In holding that the passenger act approved February 27, 1907, was upon its face valid, whereas it was discriminatory and unreasonably classified companies according to mileage and according to ownership, control and occupation so that all roads in the state were arbitrarily required to charge two cents per mile, except those of less than forty-five miles in length, which were permitted to charge four cents

per mile, provided they were not owned, leased, controlled or occupied by any trunk line, company or corporation.

8. In holding that the passenger act approved February 27, 1907, was on its face valid, when it was discriminatory and unreasonable, and classified the fares to be charged by providing half fare for children.

9. In holding to be valid upon its face the freight act approved April 15, 1905, whereas it was discriminatory and unreasonable, in that it fixed rates to be charged by any individual or railway company owning, operating, managing and leasing a railroad, but applied the penalties only to railway companies or corporations.

10. In not decreeing to be void each of the acts of the legislature of Missouri mentioned in paragraph 2 of the amended final decree, for that the penalties were so enormous, unreasonable and severe as to be an attempt to coerce complainant to put them in and prevent it from having a judicial inquiry and review; all contrary to the fourteenth amendment to the constitution of the United States; the purpose being to make this a separate assignment as to each of said acts the same as if they were separately written out and applied thereto.

309 For all of which reasons the decree and holding of the Circuit Court in such regard should be reversed.

FRANK HAGERMAN,
Solicitor for Complainant.

310 And on the 6th day of March, 1911, a petition for cross appeal was filed. Said petition for cross appeal is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3006.

CHICAGO & ALTON RAILROAD COMPANY, Complainant,
vs.
JOHN A. KNOTT, H. R. OGLESBY and FRANK A. WIGHTMAN, Railroad Commissioners, et al., Defendants.

The above named complainant, conceiving itself aggrieved by the decree rendered and entered on March 22, 1909, as of March 8, 1909, as amended by the decree rendered and entered on April 17, 1909, at the November, 1908, term of court in the above entitled cause, does hereby apply for an appeal, and does appeal from such decree to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herewith, and prays that this appeal may be allowed as a cross-appeal, and such steps taken to perfect the same as may be required by law, an appeal having already been prosecuted for the decree, and a transcript taken by the attorney and railroad and warehouse commissioners, defendants in the cause.

FRANK HAGERMAN,
Solicitor for Complainant.

The foregoing petition for appeal is presented and allowed this March 6, 1911, by the undersigned, Judge who rendered the decree appealed from.

(Signed) SMITH McPHERSON, *Judge.*

311 Afterwards, to-wit, on the 6th day of March, 1911, a bond for cross appeal was approved and filed. Said bond is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3006.

CHICAGO & ALTON RAILROAD COMPANY, Complainant,
vs.
JOHN A. KNOTT, H. R. OGLESBY and FRANK A. WIGHTMAN, Railroad Commissioners, et al., Defendants.

Bond.

Know all men by these presents that the Chicago & Alton Railroad Company, as principal, and W. H. Abel, as surety, are held and firmly bound unto the above named defendants in the full and just sum of two hundred and fifty dollars to be paid to said defendants, their heirs, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators jointly and severally by these presents.

Dated this March 6, 1911.

Whereas lately at the November, 1908, term of the above named court, in the above entitled cause, a decree was rendered against said complainant, which has obtained a cross appeal to reverse the action of the court in the aforesaid suit and a citation directed to the
312 said defendants citing and admonishing them to be and appear in the supreme court of the United States at the city of Washington, District of Columbia, thirty days from and after the date of the said citation.

Now, the condition of the above obligation is such that if the said cross appellant and complainant above named shall prosecute said cross appeal to effect, and answer all damages and costs if it fail to make good its appeal, then the above obligation to be void; otherwise to remain in full force and virtue.

CHICAGO & ALTON RAILROAD CO., *Principal,*
By FRANK HAGERMAN,
Agent and Attorney.
W. H. ABEL, *Surety.*

The above bond is hereby approved and ordered to be filed and made a part of the record this March 6, 1911.

(Signed) SMITH McPHERSON, *Judge.*

313 And on the 6th day of March, 1911, the following order allowing cross appeal was filed and entered of record, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3006.

CHICAGO & ALTON RAILROAD COMPANY, Complainant,
vs.
JOHN A. KNOTT, H. R. OGLESBY and FRANK A. WIGHTMAN, Railroad Commissioners, et al., Defendants.

Order.

This cause coming on for hearing this March 6, 1911, upon the application for an appeal by the complainant, together with its assignment of errors, an appeal is hereby allowed and bond for appeal is hereby fixed in the sum of two hundred and fifty dollars.

Inasmuch as this is a cross appeal, the clerk is directed to forward a transcript of all proceedings in the cause since the preparation and filing of a transcript of the record in the appeal taken by the defendants.

(Signed) SMITH McPHERSON, *Judge.*

314 Afterwards, to wit, on the 31st day of March, 1911, the following Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

#3006.

THE CHICAGO AND ALTON RAILWAY COMPANY, Complainant,
vs.
JOHN A. KNOTT et al., Defendants.

For good cause shown, that is, because the Clerk of said Circuit Court is unable to prepare a transcript of the record herein within thirty days from the date of the day of signing the citation herein it is

Ordered that the time for filing said record with the Clerk of the Supreme Court be, and the same is hereby, enlarged; and it is

Ordered that said record may be filed with the Clerk of the Supreme Court on or before the first day of August, 1911.

(Signed) SMITH McPHERSON, *Judge.*

Dated Kansas City, Mo. March 31, 1911.

315 Afterwards, to-wit, on the 13th day of April, 1911, a stipulation was filed. Said Stipulation is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3006.

THE CHICAGO & ALTON RAILROAD COMPANY, Complainant,
v.
JOHN A. KNOTT et al., Defendants.

Whereas, John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad and Warehouse Commissioners, and Elliott W. Major, Attorney General of the State of Missouri, defendants in the above entitled cause, have been allowed an appeal therein to the Supreme Court of the United States.

And, Whereas, the said The Chicago & Alton Railroad Company, complainant, has been allowed a cross-appeal herein to the Supreme Court of the United States.

And, Whereas, the said Railroad and Warehouse Commissioners and said Attorney General were, by said circuit court, allowed an appeal, and the Chicago, Burlington and Quincy Railroad Company was allowed a cross-appeal to the Supreme Court of the United States from a decree rendered by said circuit court in a cause then pending in said Circuit Court of the United States, wherein said Chicago, Burlington and Quincy Railroad Company was complainant, and said Railroad and Warehouse Commissioners and said Attorney General and others were defendants.

And, Whereas, the evidence offered, taken and received in the said circuit court in the above entitled cause is included in the transcript and printed record in said cause therein the said Chicago, Burlington and Quincy Railroad Company was complainant.

And, Whereas, all of said evidence was for the purpose of the hearing in said Supreme Court of the United States of the said
316 appeal and cross-appeal in said cause wherein the said Chicago, Burlington and Quincy Railroad Company was complainant, printed, under the direction of the clerk of the Supreme Court of the United States and is contained in five printed volumes now on file in the office of the clerk of said Supreme Court in the causes therein pending, numbered 21821, wherein John A. Knott and others are appellants and the Chicago, Burlington and Quincy Railroad Company is appellee, and numbered 21,837, wherein the Chicago, Burlington and Quincy Railroad Company is appellant and John A. Knott and others are appellees.

Now, therefore, in order to save the parties hereto the useless expense which would be incurred in the preparation of a complete transcript of the record and the evidence in the above entitled cause, it is stipulated and agreed between the parties hereto that upon the hearing in the said Supreme Court of the appeal and the cross-appeal in the above entitled cause, the evidence contained in said five printed volumes shall be taken and regarded as the evidence in the above entitled cause with the same effect as if it had been written out and

certified in this cause by the clerk of the circuit court, and that the evidence contained in said five printed volumes, supplemented by a transcript of all the pleadings, papers, decrees and orders peculiar to the above entitled cause, shall be taken and regarded in said Supreme Court as a complete transcript of the record and proceedings in the above entitled cause, and that it shall not be necessary for the clerk of the circuit court to include in the transcript prepared by said clerk any evidence contained in said five printed volumes.

ELLIOTT W. MAJOR,
Attorney General, Solicitors for John A. Knott, et al., Appellants.
FRANK HAGERMAN,
Solicitor for C. & A. R. R. Co., Appellee.
FRANK HAGERMAN,
Solicitor for C. & A. R. R. Co., Cross-Appellant.
ELLIOTT W. MAJOR,
Attorney General, Solicitors for John A. Knott, et al., Cross-Appellees.

317 The opinion filed herein on the 14th day of June, 1907, is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 3000.

THE WABASH RAILWAY COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri, et al., Defendants.

And Seventeen Other Like Cases.

Remarks by Judge Smith McPherson, at Two o'clock p. m., June 14th, 1907.

Here are 18 cases, in which all the railways of the State ask to file supplemental bills in equity in the 18 cases, brought two years ago against the State officers to enjoin the enforcement of statutes of 1905 fixing rates. The charge was made that the rates were not remunerative but confiscatory, and therefore void by reason of the United States Constitution. Those cases were placed at issue and referred to a master. The evidence has been taken, and the court is now advised that within a month or two the cases will be argued to the Master. So that after six months or more from now a final decree will be entered in this court. I do not speak of this delay in a spirit of complaint, or even criticism. I simply state the fact of delay. During the early part of this year the legislature of Missouri repealed part of the rate laws of 1905 complained of, enacted substitutes therefor

and placed still other commodities under specific tariff rates, including passenger rates of two cents per mile.

Early in this week notices were given of an application to file supplementary bills, attacking the rates fixed in 1907, on the ground that such rates were confiscatory.

That this is a judicial question all informed people agree. That it is a question of gravity and almost supreme importance all recognize and by none more than by the courts. It involves the question of what are reasonable rates and how determined. It involves the question of whether all the receipts for State business can be taken in their entirety, and if in the aggregate remunerative of whether the laws are valid. And it involves the question as to whether every person is entitled to have his product carried at
318 reasonable rates instead of carrying some at unreasonably low rates and others at unreasonably high rates, and allowing the law to stand because the average is remunerative. And it involves the question of whether the State of Missouri is attempting to exercise the powers solely lodged in the Congress of the United States. And there may or may not be involved the question of which is the more powerful with reference to these rates, the nation or the state.

I express no opinion as to some of these questions, on some of which I have a conviction and on others I do not even have a tentative opinion. But they are all judicial questions, and for the courts only, and in the end will be decided by the Supreme Court of the United States, a court in which every patriotic person has unbounded confidence. To that Court these questions in the end will go for decision.

As to whether these supplemental bills may be filed was set down for argument this morning at the opening of court. These rate statutes presumptively are valid, and if valid went into effect at midnight last night. Seeing the gravity of the situation, this court on yesterday, on its own motion, on inspecting the proposed supplemental bills, entered a restraining order, restraining the railways from carrying out the recent statute until the matters could be heard, as to filing the supplemental bills on which, if filed, a temporary injunction should issue. At the morning hour of this day, the Assistant Attorney General of the State appeared and stated that the Attorney General could not be here until tomorrow morning. It was also at that time made to appear that on the morning of this day suits were filed in the state courts at St. Louis and Kansas City, and a temporary mandatory injunction had been issued by the state courts, commanding the railways to recognize as valid and carry out the statute of 1907.

All courts, state and federal, recognize the delicacy of real or seeming conflicts between the courts. All courts recognize that all other courts act in good faith. And this court appreciates the situation. It is a question worthy of argument and deliberation.

319 When the foregoing situation was disclosed this morning counsel for the railways moved for a continuance for a week or ten days, to the end that the situation might be looked into. This motion will be overruled, and all these matters are set down for hear-

ing at two o'clock to-morrow afternoon. These delays cannot be allowed. The interests of the public and the railways alike demand the speedy determination of all questions connected with the foregoing statements as well as all questions connected with the validity or invalidity of the rate statute recently enacted by the state legislature of Missouri. At the time named I shall expect counsel on both sides to be ready to proceed in argument, as well as to move for such other proceedings as may be deemed proper. All of which is so ordered.

320 On the 17th day of June, 1907, an Opinion was filed. Said Opinion is in words and figures as follows:

In the Circuit Court of the United States, Western District of Missouri, at Kansas City.

THE WABASH RAILWAY COMPANY,
vs.
HERBERT S. HADLEY, Attorney General, and THE STATE RAILROAD COMMISSIONERS.

And Seventeen Other Like Cases.

Remarks of Judge Smith McPherson, Monday, June 17, 1907.

These cases were argued on Saturday and taken under advisement until this time. The situation is such that I must decide the questions today. Limited as the time has been, I have an abiding conviction of what should be done even if the reasons therefor may not be stated with the fullness that the importance of the matters requires. I have been much aided by the arguments, which were strong, eloquent and powerful, by counsel representing both sides, and as it seems to me, every phase of the questions was so illuminated by the arguments that all possible questions are at an end of debate.

The real question here is, has this court jurisdiction over the passenger fare law of 1907 of the Missouri Legislature by which it is declared that the legal fare be two cents per mile. A question connected with that is, whether the bills tendered are supplemental bills to those filed in the eighteen cases two years ago to enjoin the enforcement of the freight tariff law of 1905 now pending before the master.

A supplemental bill usually is where there has been some change in the rights or status of the parties which must be carried forward by a supplemental bill. And usually when a supplemental bill is thus allowed, matters can be brought in which could have been covered by an amendment to the original bill. These discussions as to supplemental bills, as well as to other bills, are exceedingly technical. It seems to me that the test is not so much in the way a pleading is styled, as what the allegations of the pleading are. Formerly, discussions as to various bills in equity gave rise to great delay,

321 the results being that years and years would elapse before a chancery case could be concluded. Looking back at those old discussions, it now seems to have been a folly to thus waste the time

and energies of the judges and of counsel in determining these technical questions. Such must have been the belief of the Supreme Court when a code of Rules in Equity were established, the purpose no doubt being to get rid of the old technicalities which served no useful purpose. By the adoption of the Rules in Equity, we have a system of fact pleading, covering almost every phase of equity pleading and practice; and it is only when some question of practice is not covered by the rules, that we go back to see what the practice of the High Court of Chancery in England, was, and then not as positive rules, but as furnishing just analogies. Rule 90 thus providing was adopted in the year 1842, and the Supreme Court has decided that when we go to the English Chancery practice, we must take the practice as it existed in England in 1842, when this rule was adopted. By Rule 57 it will be seen that the supplemental bill is allowed when any material event has happened after the filing of the original bill. In 1905 the Legislature of Missouri enacted a maximum freight tariff statute as to several commodities. The railways contested the validity of that statute in the eighteen actions above referred to, and these actions are still pending. By the act of 1907 the Legislature declared that all railways should charge but two cents per mile per passenger. It seems to me that this is an event happening since the institution of the original suits, and an event that is germane to the original controverted questions.

But I do not deem it of much importance to determine whether the pleadings tendered for filing are supplemental bills, or whether they are original bills.

On Tuesday, the 11th inst., the complainants gave notice of filing these bills on Friday, the 14th inst. On Thursday, the 13th inst., the railway companies asked leave to file them. Solely out
322 of courtesy to the Attorney General, who was not then present, this was refused, but the Court on its own motion issued restraining orders to keep the matters in status quo. At the time fixed, Friday the 14th inst., the matter was again delayed for a day at the request of the Attorney General, he still being absent. And on that day bills were filed in the state courts at Saint Louis and Kansas City, the purpose being, as it is said, to bring about the enforcement of this statute in question. And the argument now is, that as these cases were filed in the state courts on Friday the 14th inst., the day before the arguments were had in this court, that the same subject matter was pending in the state courts, and that the state courts would take jurisdiction to the exclusion of this court, the cases being there first pending. But the above statement of facts shows that the cases were pending in this court from Tuesday the 11th inst. and that orders were made on Thursday the 13th inst., the day before the cases were lodged in the state courts. If these matters could not be covered by supplemental, they could be covered by original bills, and they were presented prior to the institution of the cases in the state courts. It is not material whether these supplemental bills so-called are full and complete as original bills. Defects could be cured upon exceptions or demurrers, or by complainants on their own motion before the filing of an answer. Nor

is it material whether these pleadings are filed in the original cases or separately docketed; because if separately docketed, they will at once for trial purposes be consolidated with the old cases pursuant to Section 921 of the Revised Statutes. And whether the contention of counsel for the state officers be technically correct or not, the contention is without substantial merit as to the rights of the parties. These pleadings should be filed and regarded as having been filed on Tuesday, the 11th inst.

The fixing of rates by the Legislature is presumptively correct and the Railway Companies have the burden of proof of showing that the statute is not remunerative. That the fixing of rates is a legislative act, all agree. But that such rates must be reasonably remunerative, cannot longer be discussed. The railways are entitled to cost and a reasonable profit, and no fair-minded man disputes it. How to arrive at the cost and a reasonable profit, is a most difficult problem. But if the statute is challenged, it must be ascertained, and this ascertainment can only be by judicial proceedings, and must be determined by the courts, and ultimately by the Supreme Court of the United States. No skill of the draughtsman by the use of words or phrasing can take this question from the courts. It can never be settled in a criminal case by arresting ticket agents and conductors. The Supreme Court in the end must have the evidence with the right to make the ultimate findings of fact. There is but one orderly and seemly way, and that is in equity with the right of appeal to the Supreme Court, as has been said by that court over and over again. All contentions that the courts of the state can decide these questions as well as can the United States Courts, is not a question for argument, because it is a question of jurisdiction, and in my judgment, in these cases this court has jurisdiction, and having jurisdiction, the jurisdiction should be exercised.

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There seems to be much feeling in the minds of many as to where these cases should be adjudicated, but why the feeling I do not understand. And yet I recall the historical facts that at various times since the organization of this government, the feeling has run high as to whether the federal or state courts should adjudicate matters of importance to the public. No one doubts that the states have a right to manage their own local affairs, and to have matters growing out of their own local affairs determined by their own courts. But it is too late to seriously complain because the United States Courts take and exercise jurisdiction under the constitutional provision providing for the courts, and the enactments thereunder. The United States Courts, regardless of the citizenship of the parties, will take and exercise jurisdiction in actions of a civil nature when the provisions of the United States Constitution are invoked, as has been done in this case. The Constitution provides for this, and Congress has provided the procedure. The Commerce Clause of the United States Constitution has been invoked, as is the Fourteenth Amendment. These are national questions, and the Supreme Court will hold the scales of justice with the evidence before it, and why there should be any excitement or feeling about this, is beyond my comprehension. I do not know, and of course do not

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state, that the State Legislature has wronged these railways, because that is the question to be decided when deciding the merits of the case. The railways say that they are being wronged, and they should have a hearing, and the hearing should be on the evidence, and that evidence carried in the record to the Supreme Court. And if upon the evidence the railways are being compelled to transact business at a loss, no one ought to doubt but that the Supreme Court will hold the statute void. If the rates fixed are remunerative, no one ought to doubt but that the statute will be upheld. It is too late to talk about the alleged wrongs of the Supreme Court declaring statutes void. That question was fought out one hundred years ago, and from the organization of the Supreme Court down to the year 1888, being the period covering the first one hundred years of the United States Supreme Court, that court held twenty United States Statutes void. During the same period that court held one hundred and eighty-one state volumes void, of which fourteen were Missouri statutes. (See Appendix to Volume 131 U. S. Reports.) How many statutes have since been declared void by that court, I have not taken the time to ascertain. Some of the statutes thus declared void were railway rate statutes enacted by the states.

These questions are of the greatest importance. There are many complications arising. Much is to be considered besides the mere rates or fares. There must be equality of rates, the treatment and charging of all alike. No rebates; no discriminations must be allowed. Safety of the public, including passengers and employés, must be considered. And as of much importance as any other question, if not the greatest of all, is the question of efficient service. Rapid and prompt delivery of freight must be had. Fast passenger trains with but few stops, for passengers going a considerable distance, are demanded. Local trains for local passengers, are required. To have such efficient service, reasonable compensation must be paid. All these questions are involved in the fixing of rates. Between the cities of Saint Louis and Saint Joseph, one line of railway is wholly within the state, while another and competing line a part of
325 the distance is within the state of Kansas. A like situation exists between Kansas City and Saint Joseph, and another like situation exists between Kansas City and Joplin. Possibly there are other like situations. In the case of Hanley vs. R. R., 187 U. S., the Supreme Court decided that a railway connecting two points within the state, and doing business between the two points, but with a line outside of the state a part of the distance, was engaged in interstate commerce controllable only by enactments of Congress. What about the Missouri statute fixing rates over the one line wholly within the state as against a competing line a part of the distance outside of the state? I do not intimate the conclusion, but that there is a question, can not be doubted. And if the statute is void in part, is it separable, leaving the valid parts to stand with the void parts eliminated? I simply mention these questions to show the gravity and importance of these cases without in the slightest degree intimating the conclusion, often discussed by men of great

ability, but upon which as yet there has been no conclusion reached, so far as I know, by any of the courts.

It is urged with much plausibility that by reason of the case of Fitts vs. McGhee, 172 U. S., that because penalties are affixed to the Statute of 1907, that the criminal courts of the state only can take jurisdiction. I do not stop to review the various Missouri Statutes upon the subject of both passengers and freight, all of which must be considered as in pari materia; but it is sufficient to say that the inflicting of penalties is not the only remedy. The Attorney General and Railroad Commissioners still have much to do with the enforcement of these statutes which the railways contend are void in part. These matters were considered, and a conclusion reached adversely to the contention of the officers of Missouri, by the Supreme Court of the United States, sustaining Judge Philips when presiding in this court, and reversing the Supreme Court of Missouri. R. R. vs. Missouri R. R. Commissioners, 183 U. S. 53. As I understand in the original eighteen cases now pending in this court, the question was and is, whether all the earnings in the aggregate are remunerative. That theory being, I suppose, by reason of the
326 case of Smythe vs. Ames, decided by the Supreme Court, and the question is still present under the General Statutes of Missouri, the Statutes of 1905, and the Statute of 1907 in question. The time is not far distant when the question will be raised and possibly in these very cases, as to whether the statutes can stand, if some rates are too high, if the rates within the state in the aggregate are remunerative. The question will arise whether one person can have less than reasonable rates, and another be compelled to pay more than reasonable rates. Will it be a sufficient answer to say that in the aggregate the rates are remunerative Or is that a question only between the individual and the railway company? Upon this question I intimate no ruling, but the importance of the question can not be overestimated.

These cases will be set down for hearing. The orders heretofore made will stand except as now modified. The two cent passenger fare statute should be put in force, and kept in force for some months with the rights of the railways later on to renew their motions to enjoin the enforcement of the statute. One class of people claim that with the two cent fare travel will so increase as to make it remunerative. Others deny this. The Wisconsin Commission but lately declared, after months of investigation, that in that state a two cent passenger fare would be confiscatory. Governor Hughes, by a recent veto message, so declared as against an enactment providing for the two cent fare in the populous state of New York. It may be that what will be reasonable rates in parts of Missouri on one line, will be unreasonable in another part of Missouri on another line. How can these questions be determined? Is it not at present all speculation and guesswork? Of what value will be the testimony of an ordinary business man testifying by way of opinion? And of what value will be the testimony of railway experts giving opinion and illustrating *his* opinions by the use of many figures? Experience over a reasonable period of time ought to, and no doubt will,

settle these questions, at least for the time being, although what may be a reasonable remuneration one year, may be unremunerative five years hence. The Supreme Court of the United States in Smythe vs. Ames, referred to, took care of that question by keeping it open with the right to open up the case from time to time as circumstances required.

327 Therefore the orders will be that this court retains jurisdiction of these cases regardless of whether the pleadings tendered are considered as supplemental bills or original bills, and no order will be made for some months with reference to the two cent fare statute, leaving it for the time being operative and as though in full force.

328 On the 17th day of June, 1907, an opinion was filed. Said Opinion is in words and figures as follows:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

THE WABASH RAILWAY COMPANY
vs.
HERBERT S. HADLEY, Attorney General, and Other State Officers. And Seventeen Other Like Cases.

Remarks of Judge Smith McPherson, June 17th, 1907.

The real question here is, has this court jurisdiction over the passenger fare law of 1907 of the Missouri legislature declaring it unlawful to charge more than two cents per mile? A lesser question is whether the bills tendered for filing are supplemental bills to those filed in this court in the eighteen cases two years ago and now pending before Mr. Schofield, the Master.

I fully appreciate the responsibility resting upon me and the consequences to follow from the orders now to be made. If mistaken the mistakes are mine, even though I have had but part of one day since the argument to reach these conclusions. Never has a case before me been argued with greater eloquence, logic and power than was done by counsel both for the state officers and for the eighteen railways. Every phase of the case direct and collateral has been so illuminated that all possible questions are at the end of debate. What is the supplemental bill in equity? And wherein is the importance of defining it? Usually it is where there has been some change in the rights of the parties, which must be carried forward by a supplemental bill. One hundred and more years ago judges who had but little to do except play the role of mental acrobats and seek to refine and distinguish and to display an affected learn-

329 ing, and to discuss most gravely "the difference betwixt the west and northwest side of a hair" most elaborately set forth their views, as to original bills and amended bills and supplemental bills, and bills of review, and bills in the nature of bills of review. The result was that a chancery case lasted for many years. More

than fifty years ago the Supreme Court recognized the folly of much of this, and by a code of rules adopted the system of fact pleading and left the old chancery practice in force only when the 94 rules adopted did not meet the situation that might arise, and by rule 57 defined a supplemental bill. But that is not important in my judgment. Whether this proceeding should be by original bill, or by supplemental bill is of small consequence. If by original bill, the railways had the right to file the same without notice, and the right to a restraining order without notice. If by supplemental bill the practice is to require notice. And in either case it is discretionary with the judge to allow a restraining order without notice until a hearing can be had on notice as to a temporary injunction. On Tuesday the 11th instant, the complainants gave notice of filing these bills on Friday the 14th instant. On Thursday they asked to file them. Solely out of courtesy to the Attorney General, who was not present, this was refused; but the court on its own motion issued the restraining order, to keep the matter in statu quo. At the time fixed for the hearing the matter was again delayed for a day at the request of the Attorney General, he unavoidably being absent. During that delay the bills were filed in the State courts. For this there is no criticism. But I have stated the facts, and the statement of facts shows that these cases, as to the laws of 1907, were pending and had been pending since Tuesday the 11th instant. And these bills must be considered as filed as of that date. And whether defective as original bills is not material, because such defects can be corrected on demurrer or exceptions, or by the complainant before answer as of course. Nor is it material whether filed in the original cases or separately docketed. If separately docketed, they will at once for trial purposes be consolidated with the old cases, pursuant to Section 921 of the Revised Statutes. If the contention of
330 counsel for the state officers be technically correct, it is without substantial merit as to the rights of the parties.

That the fixing of rates by the legislature is presumptively correct, all concede. That it is a legislative act, all agree. But that such rates must be reasonably remunerative, cannot longer be discussed. The railways are entitled to cost and a reasonable profit, and no fair minded man disputes it. How to arrive at the cost and reasonable profit is a most difficult problem. But it must be ascertained and this ascertainment can only be by judicial proceedings, and to be determined only by the courts and ultimately by the Supreme Court of the United States. No skill of the draftsman by the use of words or phrasing can take that from the courts to the town meeting. It cannot be changed by declamation, either sophomoric or by invective. It can never be settled in a criminal case by arresting ticket agents or conductors. The Supreme Court in the end must have the evidence, with the right to make the ultimate findings of fact. No local tribunal, Federal or State, can foreclose the fact as would be done if the case goes to the Supreme Court on writ of error to the State courts, and from the State courts there is no method of review but by writ of error. There is but one orderly and seemly way, and that is in equity, with the right of appeal to the

Supreme Court as has been said by that court over and over again. The argument that the courts of the State can decide as to the validity of the laws of the State as well as can the United States courts will not be argued by any Federal judge, but will be conceded. Those courts are as high minded and as learned as are the Federal courts, but that is not the question. It is a question of jurisdiction. And this court has jurisdiction and will maintain its jurisdiction. Nor is this to the prejudice of anyone. As I listened on Saturday to the argument, I was carried back to the days of 1801-9. I recalled the judicial revolutions of Virginia and Pennsylvania. I recalled the case of Luther v. Borden, growing out of the Dorr rebellion. I recalled the bitterness of half a cen-
331 tury ago between Iowa and Missouri over the State line. I recalled the recent Lives of Thoms H. Benton and Gouvernor Morris by a distinguished author who states that at one time or another every one of the original thirteen states has tried in some form or other to destroy this government. And I recalled that in every instance, save the troubles of 1861-5, that the United States Courts have, in a dignified way, settled the disputes and law-abiding people acquiesced and the lawless element were compelled to submit.

That the States have the right to manage their own local affairs will ever be maintained. But it is too late to talk about states dictating to the Government, or to riding down its courts. This is a Nation. Its commerce will not be interfered with by any State, because for that almost alone we adopted our Constitution. The Commerce Clause will always be upheld, and the rights of the citizen, including corporations, will ever be protected in their just rights under the Fourteenth Amendment. These are National questions, and the Supreme Court will hold the scales of justice with the evidence before them. I do not know and of course do not state that the State legislature has wronged these railways. That is the case on its merits. But the railways say they are being wronged, and they must have a hearing, and a hearing on the evidence, and that evidence carried with the record to the Supreme Court. And if upon the evidence they are being compelled to transact business at a loss, no one need doubt but that the Supreme Court will nullify the statute. If the rates fixed are remunerative, the statutes will be upheld. It is too late to talk about the alleged wrongs of the Supreme Court declaring statutes void. That was fought out one hundred years ago. Down to 1888 the period covering the first 100 years of the United States Supreme Court, that court held twenty United States statutes void. During the same period that court declared as void 181 state statutes, of which 14 were Missouri statutes. (See Appendix to Vol. 131 U. S. Rep.) How many have since been declared void I have not taken the time to ascertain. And
332 some of the statutes thus declared void were railway rate statutes, enacted by the states. It must be remembered that in passenger and freight carrying there is much to be considered besides rates or fares. Important as any, if not the most important, is the equality of rates; the treatment and charging of all alike. No rebates; no discriminations, must be allowed. Safety of the public,

including passengers, and employés, must be considered. And of as much importance as any other question is efficient service. Rapid and prompt delivery of freight must be had. Fast passenger trains, with but few stops, for passengers going a considerable distance, is demanded. Local trains for local business is required. To have these reasonable compensation must be paid. So that these questions are all involved. And in consequence such business as is between St. Louis and St. Joseph, Kansas City and St. Joseph, Kansas City and Joplin, and perhaps other points, where parts of the routes of some of the lines are out of the State, a grave question is presented, and no small question is covered whether parts of these statutes are void that the matter can be separated and the balance of the statute remain in force, because Congress, even as to those lines wholly within the state, may or may not have control of such commerce when it directly interferes with commerce passing out of and back into the state. I neither pass upon this question nor express an opinion thereon, because while such questions have frequently been discussed by the ablest of men, such questions have not yet been decided. I simply mention it as a great National question.

It is urged with much plausibility that because penalties are affixed to the statutes of 1907 that the criminal courts of the state only take jurisdicion. I do not stop to review the various Missouri statutes upon the subject of both passengers and freight, all of which must be construed as in pari materia. But it is sufficient to say that the inflicting of penalties is not the only remedy. The Attorney General and Railroad Commissioners still have much to do with the enforcement of these statutes, which the railways contend are void in part. In the original cases the question was whether all the earnings in the aggregate were remunerative. That question, is
333 still present under the statutes of 1907. Whether these laws by raising the freight rates and lowering the passenger fares are remunerative in the aggregate must be considered by the court. The State is not in effect a party, because the charge is that these officers are seeking to enforce void statutes, in more ways than by inflicting penalties.

The orders heretofore made will stand until vacated or modified. The cases will be set down for hearing as to whether a temporary injunction shall issue? and if issued what shall be the scope? Shall they restrain the enforcement of the recent freight rate statute? Shall they restrain the enforcement of the recent two cent passenger rate statute? Tentatively, subject to argument, and subject to change of opinion, if I should hear the cases, my present view is that the two cent passenger fare statute should be put in force for some months at least, with the right of the railways later on to renew their motions to enjoin the enforcement of the statute. One class of people claim that with a two cent fare travel will so increase as to make it remunerative. Others deny this. The Wisconsin Commission but lately declared after months of investigation that in that State a two cent fare would be confiscatory; and Gov. Hughes by a recent veto message so declared in the populous state of New York. How is this question to be determined? Is it not all specu-

lation and guess work? Of what value will be the testimony of an ordinary business man? And of what value will be the testimony of railway experts?

Such are my present views, hurriedly stated and without time to place them in the shape of a formal opinion. Nor would it be of substantial benefit to anyone to review the many authorities. They are known to the profession and to the courts. But I have stated what the law is as I understand it to be.

334 On the 31st day of March, 1908, an Opinion was filed. Said Opinion is in words and figures as follows:

In the Circuit Court of the United States in the Western District of Missouri.

No. 2988.

THE SAINT LOUIS & SAN FRANCISCO RAILROAD COMPANY, Complainant,

vs.

HERBERT S. HADLEY, Attorney General, and Others, Defendants.

And Seventeen Other Like Cases, Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3004, 3005, 3006.

Frank Hagerman and others for Complainants.
Herbert S. Hadley, Attorney General.
John Kennish, Assistant Attorney General.
F. W. Lehmann and S. B. Ladd, for Defendants.

Opinion.

SMITH MCPHERSON, *Judge:*

Here are eighteen cases, brought by as many railway companies of the state, against the Attorney General, Railroad Commissioners of the State, County Judges, County Treasurer and shippers.

The purpose of the bill in each case, is to enjoin the enforcement of state railway rate statutes on the ground that the rates thus fixed by legislative enactment, are not remunerative, but are confiscatory. The original bill of complaint in each case was filed in 1905 assailing an Act approved April 15, 1905 fixing rates. In June of that year temporary injunctions were issued. In December of that year answers were filed, and on defendant's motion the cases were referred to a Special Master before whom the cases are still pending.

That statute was enacted in lieu of certain sections of the Revised Statutes of the State.

In 1907 the Legislature enacted a statute which was approved March 19, 1907. This statute after referring to the one of 1905, declared that the same

335 "Be and hereby are repealed, and the following to be known as sections 1194, 1194*a*-1, 1194*b*-1, and 1194*c*-1 of said Revised Statutes, are enacted in lieu thereof."

Then follow four sections designated as above.

By still another statute passenger fares were fixed at two cents per mile, theretofore three cents per mile.

In June 1907 each company filed another bill, concerning which see the opinion by this Court in this case in 155 Federal Reporter 220. Since that time the cases have been pending before the Master, the delay occasioned in part at least by an awaiting of a decision of the Supreme Court in what are known as the Minnesota and North Carolina cases. This Court declined to grant a temporary injunction as to the passenger rates, but granted such writ as to the freight rates. Both statutes of 1907 provide for penalties for a violation of the enactment, and expressly recite that any liability or penalty incurred under the statute of 1905 may still be enforced. It is now claimed that the original cases are at an end because the statute of 1905 has been repealed. The Court cannot so hold. As has been noticed for the statute when repealed, there was a substitute enacted. One rate was cut out and another fixed, with the penalties under the prior statute remaining. This does not overthrow the original cases. They are rightfully pending with part of the subject matter still in existence, and a new alleged grievance in place of the old. This new grievance, if one, should be brought forward by a supplemental bill, that being the office of such a bill.

Two shippers on each road are made defendants. That it is proper to make them parties cannot be in doubt, as they have a direct interest. Whether a decree herein will be binding on other shippers, is a question not now for decision. And that the County Judges and Prosecutors have to do with these laws is plain. But these matters are exceedingly technical. The real question as to parties, is as to making the Railroad Commissioners and Attorney General parties defendant. As to the right to make the Attorney General and the Commissioners parties defendant, is a question that has been argued for and against with much earnestness and by the citation of many authorities.

336 At common law the office of Attorney General was the highest law office of the Crown. He represented the Crown in all legal matters and was the responsible officer as to the legal duties and prerogatives, appearing in the courts of record and the House of Lords in all matters affecting the public, to the end that justice might be done in the name of the King. The duties of that office are not less in this country, and the specific mention of many things that he must do in behalf of the public and the State are not to be regarded as exclusive in the full performance of his duties.

The Constitution and Statutes of Missouri make special mention of many things that he is required to do. He is upon a salary, and cannot receive fees. He is a member of the State Board of Equalization and of Education, as well as other Boards. He prosecutes suits on official bonds. He prosecutes railroads for refusing to grant proper rates to shippers. He must appear before the Interstate Commerce

Commission when residents of the state are being wronged. He asks for, and receives, the aid of additional counsel. He sees to the enforcement of the banking laws, and proceeds against express companies and railroad companies and looks after forfeitures. These and a great many other things he is specifically required to do. And the importance and dignity of his office are such, that in most instances he is relieved from making oath to papers that he is permitted or required to file. And then out of apprehension that because certain things are specifically mentioned, that the conclusion would be arrived at by construction that all other matters were excluded, Section 4943 of the Revised Statutes was adopted, requiring that officer to institute and prosecute all suits and other proceedings at law and in equity requisite or necessary to protect the rights and interests of the state and to enforce any and all rights, interests or claims of the state against any and all persons and corporations.

It would seem that from the foregoing there could be no doubt but that it is the duty of the Attorney General to enforce the statutes in question presented by these cases, if valid, not only by virtue of the duties pertaining to that office by common law, but as well by the statutes just alluded to.

337 But there is a further statute which counsel on both sides have overlooked. Chapter I of the Laws of 1907 by Section 61 thereof eliminates all doubt by appropriating twenty thousand dollars per year to be drawn by the Attorney General from time to time "which said sum shall be expended under the direction of the attorney general in the prosecution or defense of suits heretofore brought, or that may hereafter be brought by or against any railroad company, wherein the validity of any act of the general assembly may become involved or contested."

It will be noticed that this appropriation of this large sum of money is made not only to the end that the attorney general may seek to maintain the validity of any statute brought in question by any case hereafter brought, but likewise covers cases heretofore brought. And in the light of that section appropriating forty thousand dollars for the biennial period of two years to be drawn by the Attorney General and expended under his direction, leaves no room for argument that it is the duty of the Attorney General to enforce all statutes enacted by the General Assembly and see to it to the best of his ability that no court by decree or judgment holds the state enactments void.

Without scheduling the different statutes, the duties of the Commissioners are likewise plain. They are vested with authority to fix rates, and should the statutes in question be overthrown as being void, they will at once fix some other rate in their judgment valid. The question as to making the Commissioners parties defendant has been put at rest by the case of the Commissioners vs. R. R. 183 U. S. 53.

Again, as when the cases were brought, and first argued, it is urged that the state in effect is being sued in violation of the Eleventh Amendment, and the question has again been argued with force, logic and eloquence. That a determined effort has been made by the

use of words, phrasing and forms within the past two years, regardless of substance, effect and meaning, by the states to deprive the United States Courts of jurisdiction vested by the Constitution
338 and laws enacted by Congress, is known by all. The argument is to the effect that all litigation of and concerning the fairness, and validity as well, of state statutes shall be in the courts of the state whose legislation is assailed, leaving the right and the only right of carrying questions of law to the United States Supreme Court by writ of error, but likewise insisting that in cases as to the reasonableness of rates, dependent wholly upon facts, that a writ of error be unavailing, and that the state courts of the state whose state legislation is assailed, shall alone and finally decide the case. And that this will be so in a chancery case as well as in an action at law by the only remedy, by writ of error to a State Supreme Court, when the case depends upon questions of fact, has been held by the Supreme Court in Egan vs. Hart, 165 U. S. 188. There are others who believe that all matters both of fact and law arising under the Constitution of the United States should in the end be decided by the only court created for that purpose. So it is that a sharp conflict is presented. Almost from the beginning of our government this question at short recurrent periods has arisen, but generally concluded by the Supreme Court holding that this is a National government with a National Judiciary, and that the National Constitution is and shall forever remain the supreme law of the land, anything in the laws of any state to the contrary notwithstanding. When our government was organized, every of the thirteen states was in debt, and some of them well high hopelessly so. In and out of both the National and State Conventions the arguments were for and against whether a state could be sued in a National Court. Hamilton and Marshall and Madison said it could not be done. Patrick Henry with his numerous doubts and opposition was filled with fear. Others like James Wilson and Edmund Randolph said the state would and ought to be suable by a citizen of another state for wrongs done. Near the end of Washington's first term, the famous suit of Chisholm vs. Georgia was decided, the holding being that Chisholm, a citizen of South Carolina could recover judgment for money that the State of Georgia justly owed him.

339 It is said that within two days from that decision, a resolution was offered in the Senate to amend the Constitution to prevent such suits, by declaring that the Judicial power shall not extend to any suit against a state by a citizen of another state. But that failed because it was urged that notwithstanding the decision in the Chisholm case, such jurisdiction had never extended nor existed. Thereupon new phrasing was adopted, and a new resolution was offered, reciting that "The Judicial power of the United States shall not be construed to extend to etc." shortly ripening into the Eleventh Amendment. The only purpose of that Amendment was to prevent a state from being sued by its creditors, and history furnishes the proofs conclusive of the correctness of the statement.

Those who are doubtful of this need only read what Chief Justice Marshall said in Cohens vs. Virginia (6 Wheaton).

At common law from time immemorial, a public officer was not allowed to justify under a void law or void order, but was compelled to make restitution of the property taken or to pay damages therefor. And such has been the uniform holdings in this country, and for the reasons that a void statute or void order is utterly without effect and is wholly unavailing as a defense. Such has been and is the law of England, and such has been and is the law of this country. And why such should not be the law on the equity side of the docket by preventative remedies against threatened wrongs, is difficult to conceive.

But the Supreme Court has held in the cases of In Re Ayres, 123 U. S. 443, and Fitts vs. McGhee, 172 U. S. 516, that in cases wherein the state as a state is affected, that a suit against the officers is in effect one against the state in contravention of the Eleventh Amendment. It is to be noted that both the cases above referred to would have been decided as they were decided, if taken to the Supreme Court by writ of error to a State Supreme Court, or by appeal from a Circuit Court, if the Eleventh Amendment had never been adopted. This is so because in the Ayres case a full, adequate and complete remedy at law existed, and in the case of Fitts vs. McGhee the sole purpose was to enjoin criminal proceedings.

340 But it is now too late to object to the jurisdiction of a Circuit Court to enjoin the enforcement of a rate statute alleged to be void because confiscatory, although concededly the holdings now are that the test is not whether the state is a party to the record by name, but is the state in effect a party?

But in the case at bar the state as a state has no interest. And the state as a state is not attempting to confiscate property. It is the government of the state, first by its legislature, and then by its officers, who according to the allegations of the railways, are attempting to confiscate property. Whether such acts will amount to confiscation if carried out, relate to the case on its merits. But the point to the whole matter is, that the state is not seeking to act, and no effort is made to enjoin the state, either by name or in effect. And this distinction is not metaphysical, but is a substantial distinction, clearly and unmistakably pointed out by Justice Matthews in Poindexter vs. Greenhorn, 114 U. S. 270. *290* wherein he said:

"In the discussion of such question, the distinction between the government of a State and the State itself is important, and should be observed. In common speech and common apprehension they are usually regarded as identical and as ordinarily the acts of the government are the acts of the State, because within the limits of the delegation of power, the government of the state is generally confounded with the State itself, and often the former is meant when the latter is mentioned. The State itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative, but outside of that, it is a lawless usurpation. The Constitution of the State is the limit of the authority of its government, and both government and state

are subject to the supremacy of the Constitution of the United States, and of the laws made in pursuance thereof. So that, while it is true in respect to the government of a State, as was said in Langford vs. United States, 101 U. S. 341, that the maxim, that the king
341 can do no wrong, has no place in our system of government; yet, it is also true, in respect to the State itself, that whatever wrong is attempted in its name is imputable to its government, and not to the State, for it can speak and act only by law, whatever it does say and do must be lawful. That which, therefore, is unlawful because made so by the supreme law, the Constitution of the United State, is not the word or deed of the State, but it is the mere wrong or trespass of these individual persons who falsely speak and act in its name.

So that it follows that the State of Missouri is not a party either by name, nor in effect. And this Court has jurisdiction both of the subject matter and of the parties, to inquire into the questions in the case and on a final hearing decree whether the rates fixed by statutes are remunerative or confiscatory.

On what basis the Master shall report, is not clear. Every person whether a passenger or shipper, is entitled to have efficient service at reasonable rates, which the company must give for such compensation. Whether such charges for every person can be fixed by a decree, is doubtful, and in any event will be attended with much difficulty. But if all earnings in the state for state business are to be taken in the aggregate, less expenses, the question is attended with difficulties, because of the matter of expense, it being difficult to apportion the expenses between the state and interstate business.

If the parties cannot agree, the Master should be directed by a supplemental order.

These cases should be brought to a final decree, and that decree such as can be carried to the Supreme Court for final determination, and not for a reversal because of an error of the Master or the Court in determining the expenses. What would be still more to the point would be for the Master to determine the expenses from the standpoint of both the railway company and the Attorney General. And there is no valid reason why the cases should not be brought to a conclusion within the next ninety days. And if this is not done, the delay will not be chargeable to the Court.

342 This memorandum opinion was written many weeks since, but withheld by request, awaiting the decisions of the Supreme Court in the Minnesota and North Carolina cases. Those cases were decided on the twenty-third instant, adversely to the State officers. And it is deemed unnecessary to await the opinion, which this Court has not yet seen.

Kansas City, Missouri, March 31, 1908.

343 The Opinion filed on the 8th day of March, 1909, is in words and figures as follows:

In the Circuit Court of the United States, Western District of Missouri, at Kansas City.

No. 2988.

THE ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Complainant,
vs.
HERBERT S. HADLEY, Attorney General of the State of Missouri; Joseph P. Rice, John A. Knott, and Frank A. Wightman, Railroad Commissioners of the State of Missouri, et al., Defendants.

And Seventeen Other Like Cases, Being Numbered 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3006.

Mr. Frank Hagerman for each and all of said Eighteen Railroad Companies.

Mr. Herbert S. Hadley, Attorney General, Mr. John Kennish, Assistant Attorney General, Mr. S. B. Ladd, and Mr. Frederick W. Lehmann, for all defendants, in all of said cases.

With Mr. Hagerman the following appeared for the railroads as designated:

Mr. W. F. Evans for St. L. & S. F. R. R. Co.
Mr. M. A. Low for C. R. I. & P. Ry. Co.
Mr. M. A. Low for St. L. K. C. & C. Ry. Co.
Mr. O. M. Spencer for C. B. & Q. R. R. Co.
Mr. J. G. Trimble for Q. O. & K. C. R. R. Co.
Mr. Gardiner Lathrop for A. T. & S. F. R. R. Co.
Mr. S. W. Moore for K. C. & S. Ry. Co.
Mr. Geo. P. B. Jackson for M. K. & T. R. R. Co.
244 Mr. J. L. Minnis for Wabash R. R. Co.
Mr. R. A. Brown for St. J. & G. I. Ry. Co.
Mr. E. L. Scarritt for C. & A. R. R. Co.
Mr. John H. Lucas for K. C. C. & S. Ry. Co.
Mr. M. L. Clardy for Mo. Pac. R. R. Co. and St. L. I. M. & S. R. R. Co.
Mr. J. D. Hostetter for St. L. & H. Ry. Co.
Mr. S. H. West for St. L. S. W. Ry. Co.

Opinion.

SAPPINGTON McPHERSON, *Judge:*

1. Each of the eighteen railroad companies is doing a general railroad business within the State of Missouri, all but one doing both a state and an interstate business. Under the general railroad statutes of the state, the railroads were classified under three classes, the one class being allowed to charge for passenger rates three cents per mile, and the other two classes four cents per mile. Freights likewise were classified with certain maximum rates. The Railroad

Commissioners of the state were authorized to fix and establish rates, not in excess, however, of these maximum rates fixed by statute.

In the year 1905 the Legislature of the state by statute which took effect June 16th, 1905, provided for certain maximum charges. On the day the statute took effect each of the railroad companies filed their bills of complaint herein against the Attorney General and Railroad Commissioners, asking that they be enjoined from enforcing the statute upon the ground that the rates thus fixed were not remunerative, resulting as is alleged, in the taking of their property without compensation. A restraining order in each case was issued, and within a few days thereafter upon notice and full hearing, a temporary writ of injunction as prayed was issued. Several months thereafter the cases were referred to a Special Master to take the evidence and make his findings of fact and report the same to the Court.

345 In 1907 the Legislature of the state repealed the statute of 1905 and enacted a substitute therefor, which act was to take effect in June, 1907. On or about the day the statute was to take effect, each of the complainants filed its amended and supplemental bill setting forth the pendency of the actions and the action theretofore taken by the Court therein, and asking that the enforcement of the statutes, one of which fixes certain maximum freight rates, and the other, passenger rates of two cents a mile, be enjoined on the ground that such rates were not remunerative, but confiscatory, and if enforced, would be taking the property of the railroad companies without compensation. At or about the same time the state officers instituted proceedings in certain State Courts of Missouri against the railroad companies asking for an order that said two statutes of 1907 be enforced.

The Attorney General and his associates insisted that an entirely new situation was presented and insisted that the proceedings were instituted in the State Courts in advance of filing the Supplemental bills herein, and insisted that the State Courts had first acquired jurisdiction of the subject matter which would be to the exclusion of any action by this Court. The railroad companies insisted that the general subject matter was covered by the original bills of complaint and defendants' answers thereto, and that the statutes of 1907 should be carried forward by supplemental bill. It was likewise most earnestly contended that the actions in this Court were in effect against the State of Missouri in contravention of the Eleventh Amendment to the Constitution of the United States. But this Court after the fullest argument and consideration adjudged that this Court was not seeking to take jurisdiction against the State of Missouri as a state, and that the very office and nature of the supplemental bill as recognized from time immemorial by the equity practice required this Court to take cognizance of the supplemental bills and proceed with the litigation. (161 Fed. 419.)

346 In June last by agreement of parties, the Court revoked the previous order of reference to the Special Master and directed him to return to this Court the evidence he had already

taken, and ordered that the case be tried upon oral testimony and such documentary evidence as the respective parties might offer. The evidence has been concluded, and the cases have been fully argued, and are now for final decree.

2. Many believe that the better and safer practice would be to confine all litigation to the State Courts wherein is involved the validity of rates to be observed by railroads and other public utilities when such rates are fixed by ordinances of a city or statutes of a state. It is insisted that this would be more deferential and more in a spirit of comity to first allow the State Courts to pass upon such questions. It is urged that the decree of a State Court could be carried to the Supreme Court of the United States for final decision.

This is plausible and convincing to men who have not thoroughly considered the question. It is plausible, because such a course can be followed. But every thoughtful and patriotic man well knows and believes in the proposition that the Supreme Court of the United States should ultimately pass upon all questions arising under the Constitution of the United States. And the question whether rates thus fixed by ordinance orstatute are confiscatory or remunerative, is one arising under the Constitution of the United States, and that question is wholly a question of fact, and is not longer an open question as to the law. This being so, the question cannot be passed upon by the Supreme Court of the United States on these questions of fact when there is a conflict in the testimony. Section 709 of the Revised Statutes of the United States is the only authority for taking a case from the highest court of a state to the Supreme Court of the United States, and the procedure thereby allowed is by writ of error. And the office of a writ of error is to authorize an appellate court to review questions of law and not to review questions of
347 fact. So that when a case goes from the Supreme Court of a state to the Supreme Court of the United States, it can only go by writ of error, and the Supreme Court of the United States necessarily must take all questions of fact as being foreclosed by the State Courts. Therefore, when the case is wholly dependent on controverted questions of fact, it is utterly useless to carry the case to the United States Supreme Court from the decision of the State Courts, as an affirmance necessarily will be ordered, and the question as to whether the United States Constitution is being trampled down cannot be considered. There is no other method of reviewing the decision of the State Court by the Supreme Court of the United States than by writ of error, and this is so in chancery cases as well as in actions at law.

State Corporation Com. of Va. v. Atlantic Coast Line Co. recently decided by the Supreme Court of the U. S.
Bement v. National Harrow Co., 186 U. S., 70, 83.
Dower v. Richards, 151 U. S., 658, 666.
Egan v. Hart, 165 U. S., 188.
Adams v. Church, 193 U. S., 510.
Chrisman v. Miller, 197 U. S., 313, 319.

It follows that all efforts to enforce the trial of such questions in State Courts would result, if successful, in having the State Court

finally determine when the National Constitution as the Supreme Law of the land, shall be applied. The Supreme Court of the United States is the tribunal to finally determine all questions, including those of fact, wherein the National Constitution is involved.

3. Upon their face the statutes in question are with reference only to state commerce. But it is urged that they are void because in effect they directly have to do with interstate commerce. The facts are as folows:

Between Kansas City and the Joplin mining district there are three lines of railway. The Missouri Pacific between these points is wholly within the state, and the other two, partly within
348 and partly without the state, and therefore between the two Missouri cities of Kansas City and Joplin, are doing an interstate business under the decision of Hanley v. R. R., (187 U. S. 617). The same situation exists between the cities of St. Joseph and Kansas City, two of the roads being wholly within the State between the two points, and two partly within and partly without.

And between the cities of St. Joseph and St. Louis such situation is emphasized, the Burlington road being wholly within the state between the two cities, and the Missouri Pacific a part of the distance being within the State of Kansas. The facts are that when the Missouri statutes lowered the passenger rates on the roads wholly within the State between said points, the interstate roads between said points were completed by competition to lower their rates to correspond with the state rates thus fixed by statute. By reason thereof the argument is that the Missouri statutory rates control the interstate rates between the cities named, and therefore are void as being in conflict with the Commerce Clause of the National Constitution.

During the period of railroad building, for a time the western termini were at the Mississippi River. By reason thereof, and by reason of competition on account of river transportation, the railways fixed rates from the East to that river. After a time roads were completed to the Missouri river. Rates to points on that river were fixed on rates to the Mississippi River, plus rates between the two rivers. And for thirty years or more rates have been thus fixed. And as the Missouri statutes lower the rates between the two rivers, the argument is that the statutes lower the interstate rates from the East to Missouri River points, and to points to the West.

This presents a great question, and one which is far reaching and in importance cannot be overstated. In the great case of Ex parte Young, (209 U. S. 123,) decided but last year, the Supreme
349 Court in its majority opinion in speaking of this, said: "The question is not, at any rate, frivolous." But the point was not decided. But here the question is fairly and sharply presented for decision, with no precedents directly in point.

From the days of the Confederacy to the present time there have been clashings between the National Government and the States, owing, in part to the ever changing trade and commerce, and in part to the different schools of belief as to our system of government. And the pendulum will ever move back and forth. Even those who most strongly denounce the Kentucky Resolutions, and the doctrine

of nullification, are often the first to forget that they believe in not only the express but the implied powers of our government as taught by Marshall in McCullough v. Maryland, (4 Wheaton,) and that this government is one of the whole people. Such as thus believe are often the first to advocate and rush through in the form of state regulation, measures for their own state, regardless of the rights of the people of other states. Neither the Ohio River nor any other boundary has been the dividing line. Many of the cases in which state statutes have been declared void by the Supreme Court are statutes requiring a license to sell imported goods; imposing a tax on bills of lading for gold carried out of the state; imposing taxes on alien passengers; imposing taxes on passengers and merchandise carried into or out of the state; taxing drummers; regulating telegrams sent to other states; taxing those who use wharves; requiring inspection of animals for slaughter; and other like statutes in principle. All such statutes have gone down by reason of the Commerce Clause, and the uniform holdings of the Supreme Court.

The Commerce Clause gives Congress the power to regulate commerce:

1. With foreign nations;
2. Among the several states;
3. With the Indian tribes;

As to the first and last no doubt Congress can not only regulate, but can prohibit. It is another proposition whether commerce can be prohibited among the states.

One of the methods resorted to for the construction of Constitutional provisions, as well as of statutes, is to ascertain the then existing evils. We find that New York and other sea coast states placed burdens on commerce from inland points to sea coast points and across such states for shipment by water. It was burdens on commerce that the inland localities complained of, and that such burdens should not be imposed, was the reason for adopting the Commerce Clause. If there had been no such burdens, it is likely that there would have been no Commerce Clause, and possibly no Constitution. I have searched diligently, but find no case decided by the Supreme Court declaring a State statute void that did not in some form and in some manner place a burden on, or in some way hamper or obstruct, commerce from or to another state.

The case of Louisville & Nashville R. R. v. Eubank, (184 U. S., 27,) comes more nearly sustaining the proposition that the Statutes of Missouri impinge upon the Commerce Clause than any other case that I recall. There the State of Kentucky by its Constitution provided that more should not be charged for a short than a long haul. The company had rates in force from Nashville, Tennessee, to Louisville, Kentucky, which were less than was being charged from points in southern Kentucky to Louisville. This was held by the Court of Appeals of Kentucky to be in violation of the State Constitution. So that we have a case of a state law, with the decision of the State Courts read into it, providing that more shall not be charged for a short haul wholly within the state, than for a long haul partly with-

out the state. This must be so, because the same provision of the Kentucky Constitution when applied to places all within the state was upheld by the Supreme Court, as will appear from the case of Louisville & Nashville R. R. v. Kentucky, 183 R. S., 503.

351 And the case of Wabash &c., R. R. v. Illinois, 118 U. S., 557, was decided in like manner, because and for the only reason that the Supreme Court of Illinois had so ruled as to read into the statute the objectionable feature.

But the Missouri Courts have not so construed these statutes of the state. When they do so decide, then the Eubank, and Illinois cases will be the precedents to thwart such legislation as thus construed. In the meantime there is no belief that the Missouri Courts will so decide.

The case of Hall v. De Cuir, 95 U. S. 485, is cited by counsel for the railways. Louisiana had a statute requiring carriers to receive and carry passengers without distinction on account of race or color. The steamboat in question plied between New Orleans and Vicksburg, doing both a state and an interstate business. The vessel was duly enrolled and licensed for the coasting trade. The boat had an upper and a lower cabin, the upper for white people, and the lower for colored persons. The plaintiff De Cuir was a colored woman, and took passage at a landing in Louisiana for another landing in that state. Being refused admission to the upper cabin solely because she was colored, she was awarded damages in a State trial court, which judgment was affirmed by the State Supreme Court. The Supreme Court of the United States reversed the judgment. Two reasons were given for the reversal, the one by Justice Clifford on the ground that navigation of the Mississippi River is wholly within the control of Congress. The other opinion was by the Chief Justice, who grounded his opinion upon the proposition that with the objections of most people to associating and rooming with colored persons, that to allow a colored woman to be carried in the first cabin, even though but for a ride within the state, would drive white passengers seeking an interstate ride from the boat. Or, as I have hereinbefore stated the statute in effect placed a burden on the interstate business. After discussing the question, and the many and great difficulties in applying the Commerce Clause, the Chief Justice said:

352 "But we think it may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress."

The State statute in order to be declared void, must by its terms, and recitals interfere directly with commerce to or from another state, or the statute by construction given it by the highest court of the state must so operate in its results. But here we have no such recitals in the statute, and it has not been so declared to mean by the Missouri Courts. And while counsel for the railways do not in terms so insist, they in effect urge that the laws of political economy, custom and convenience shall act as a substitute for Missouri statutes, and the decrees of the Missouri Supreme Court. In other words, they in effect, and I believe in language insist that the rules formu-

lated a third of a century ago for making rates first to the one river, and then between the two rivers, and the laws of competition, shall be regarded as the equivalent of statutory law. I am mindful that it is believes by many that to not recognize these laws of trade will impair if not destroy the great cities like St. Joseph, Kansas City and St. Louis. I am mindful of the fact that between the two rivers the distance by the Burlington is but 198 miles, with other roads 300 miles or more, and that the shorter road necessarily fixes the rates between all points on the rivers. But competition does that, and the statutes are silent. The statute may or may not be unfair. I am considering the Commerce Clause as to its bearing on statutory enactments, and am not forgetting that many valid statutes are unfair, and some even unrighteous.

I have believed heretofore that the rights and duties, powers and prerogatives of any one state are the same, neither more nor less, than those of any other state, and this is so whether we compare two or more of the original Thirteen, or one of the older with one of the newer states. But in effect the argument of counsel for the railways is that this is not so. Missouri and Maine were admitted into
353 the Union the same day by the same enactment. Maine has but its percentage of commerce into and out of the state, with no trans-state business by reason of its geographical position, and has no large city. Missouri is a central state, with large cities, one of which is third in importance as a wholesale center, and second to but few as a manufacturing place. St. Louis and Kansas City are the gateways for both commerce and passengers, surpassed only by one, or possibly two other places. These facts are of tremendous importance to those who legislate either for the state or for the nation. That legislation can be harmful to these great interests, any thoughtful person can readily see. But that these facts, important as they are, can be used to give a construction to or coloring of the Commerce Clause, I do not believe. In my opinion it is much the wiser to contend for the strength and power of the nation, by insisting also upon the rights and powers of the states as was intended they should have. For a third of a century it has been the recognized constitutional construction that the states have the power within defined limits to regulate charges by railways wholly within the state. And to now say that one state like Maine can regulate charges by a railway for transportation wholly within the state, and that Missouri cannot because flanked by two great rivers, and by a long time custom in fixing rates is to announce a rule not heretofore recognized and in my opinion one entirely illogical.

It may or may not be true, that it would be for the better to have all the interstate railways of the country, doing both a state and an interstate business, under one supervising authority, such as a commission, regulating both classes of business. But under the Commerce Clause can this be done?

Employers' Liability cases, 207 U. S. 463.
Wabash R. R. v. U. S. (7th Circuit) — Fed. Rep. —.
9 Columbia Law Review, 38.
U. S. v. Colorado &c., R. R. Co., 157 Fed. 321 (8th Circuit).

354 Difficult as these problems are, they can and will be solved, and for the right. Pessimists discourage. However, their statements that everything is wrong, and will grow worse, must be heavily discounted. Because railway systems reach into many states and are units, crossing state lines arbitrarily fixed, a hopeless condition is not thereby brought about. It is not true as some say, that each state can lower the rates to confiscation, as all know who have read the decisions to any purpose. I believe as firmly as does anyone in the power and the rights of our general government, and when the clashings come as to the power of the state and the general government, let the doubts be solved in favor of the government. But as to some matters there are no doubts, and two of these are that the Constitution is the supreme law of the land, and that as to all local matters the states are in control. All should insist upon both.

4. It is contended that the statutes are void because of the excessive penalties, reliance being based on the case of Ex parte Young, (209 U. S. 123). Until the decisions in the Minnesota cases, (134 U. S. 418, and 467) it was an open question whether a review of rates fixed by a legislature or a commission acting under a legislative authority, could be had by the courts. The Minnesota statute authorized a commission to fix certain rates, which rates thus fixed should be final and conclusive. The Supreme Court of the State adjudged that such rates were not merely advisory, nor prima facie reasonable, but conclusive, and not subject to review by the courts. (37 N. W. 782.) But the United States Supreme Court reversed that decision, and notwithstanding the strong dissenting opinion by Justice Bradley, concurred in by Judges Gray and Lamar, and Justice Miller hesitating, the question is now at rest, and the courts not only can, but must, determine the question whether such rates are reasonable.

In time the Legislature of Minnesota believed it could in another way make its determination as to rates conclusive and beyond the powers of the courts to interfere. This was attempted by
355 providing penalties for violations, to that which was equal for one weeks' business to life imprisonment for all officers and agents, and confiscation of all the railway property, if resistance by litigation was made, and such litigation failed. The decision in Ex parte Young followed, the Supreme Court failing to see the distinction between a statute providing that agents should become felons with life imprisonment pronounced, and all corporate property seized and confiscated, if an unsuccessful contest should be made in the courts.

The Statute of Missouri of April 15, 1905, covered by the original bills herein, fixes the only penalty for violations by allowing treble damages and a reasonable attorney's fee. Citation of authorities need not be made to sustain such penalties. And in any event that statute has been repealed. The two cent passenger rate statute of February 27, 1907, provided for a penalty of not less than one hundred nor more than five hundred dollars. What shall be deemed a complete or separate offense is not defined. The freight

rate statute of March 19, 1907, provides for no minimum penalty, but the same shall be a fine not exceeding five thousand dollars. Imprisonment is not designated under either statute, unless by some general statute for the non-payment of the fine; while under the Minnesota statute the penalty for each offense was fixed at a fine of not more than five thousand dollars, or imprisonment in the State prison for not more than five years, or both.

This objection to the Missouri statutes is without merit.

5. Evidence is before the Court tending to show that a large number of men have been discharged from the service of the railroad companies by reason of the reduction of rates. And this fact is urged as one element that should be considered. It is true that before interest can be paid on the bonded debts, that operating expenses, including labor, and materials, largely made up from labor, must be paid. And as of course all of these including interest must be paid before dividend checks are issued. The states should
356 and usually do attempt to legislate in the interest of laboring men. And if the legislation under consideration is hostile to their interests, the legislature, and not the courts, have the responsibility. I agree to all that was said in argument in their behalf. I agree that in sobriety, and intelligence, and faithfulness to duty, they are surpassed by no other class of men. Their dangers are great, and the people owe them much. But if employés are reduced in number, or now or later on their compensation will be reduced, and if such results are by reason of legislation, then their remedy, if they have one, must be sought elsewhere than in the courts.

6. It is urged in argument that the reduction of rates will impair the service to the public. The charter of a railroad is an implied contract with the state. The company is given such right under such contract to perpetually operate its road. The state agrees that it shall be reasonably and sufficiently remunerated according to the business done. The company agrees to furnish reasonably efficient service. To furnish no service is a complete breach of the contract. To furnish a partial service is a partial breach. What is a reasonable service, is a question of fact dependent upon the circumstances of each case.

Thus it is that the Supreme Court has held that in some instances state legislation is valid which requires through and interstate trains to stop at important towns to let off and take on passengers, state and interstate.

Mississippi v. R. R., 203 U. S. 335.
L. S. & M. S. Ry. v. Ohio, 173 U. S. 285.
Gladson v. Minnesota, 166 U. S. 427.

And in other cases such state legislation has been declared invalid.

R. R. v. Illinois, 163 U. S. 142.
R. R. v. Illinois, 177 U. S. 514.
R. R. v. South Carolina, &c., 207 U. S. 328.

All those cases turned on the facts, and the question of fact was as to the service the public should have.

357 Of course the service rendered, and the compensation received should have a proper relation. The expenses incident to, and that can be specifically located in connection with, a particular train, are not all the expenses to be accounted for, as will hereafter be discussed. But it is true that without reasonable compensation there cannot be reasonable service. It is common information that the public in many localities is demanding increased service.

But this phase of the question is so indefinitely covered by the evidence, and is so general in the very nature of the question that no decree can be rendered herein that will cover the proposition.

7. It is urged that these statutes are void because they are not enforceable as to some of the railway companies within the state, and the claim is, that being void as to some, they are void as to all. It is conceded in argument that as to two roads, the St. Louis & Hannibal, and the Kansas City, Clinton & Springfield, the rates fixed are not compensatory. The State's experts agree to this.

Usually statutes fixing rates for railroads to observe, classify the roads according to their earning power, and fix the highest rates for those earning the least. But this was not done, except that railroads of a length not greater than forty-five miles not owned, nor leased nor controlled by a trunk line, may change four cents per mile per passenger.

The sole theory upon which rates are adjudged void can only be that the rates are not compensatory, and to so decree, the Court must have the complaint of each and every road making the claim. Complainants have recognized this by their counsel in bringing as many independent actions as there are railroads complaining. Whether there are any other railroads within the state than these eighteen complainants, neither the allegations of the pleadings nor the evidence show. Perhaps the Court should take judicial notice of whether there are other roads or not. Be this as it may, the
358 Court is not advised. I assume there are no other roads within the state than these eighteen.

The record shows that two of the cases, those brought by the Rock Island and the St. Louis, Kansas City & Colorado, have been consolidated for trial purposes, the one road having become the owner of the other since the litigation commenced. The record further shows that nine cases were tried, and that the other eight cases were to be covered by decrees the same as decrees in some of the cases tried, the particular cases being designated by the record. All this shows to my mind that complainants' counsel rightly conceived the theory upon which these bills of complaint were presented. The record shows further that before the Master, there were many attempts for position on both sides as to what cases should be tried, the Attorney General and his associates desiring that the Burlington and two other strong roads having the short lines, should be heard, and the others either continued or that decrees in the other cases should follow the decrees in the cases of the strong roads. Counsel for the railroad companies were desirous of trying the cases brought by some of the other companies, or at least that the roads should be classified into three or four classes, but that the Court should hear only one case of

each class. This emphasized the theory that was in counsels' minds all the way through this litigation.

In one respect at least it seems to me that these statutes should be declared valid or void as the facts may warrant, as has been frequently done with reference to ordinances of cities. The ordinances of cities regulating speed both for trains and teams are declared unreasonable, and therefore not enforceable as to some parts of the city, and valid and enforceable as to other parts of the city not so densely populated. These statutes are not void upon their face. The company which alleges that they are void must make a showing that the rates, considering all the facts and circumstances, are not compensatory as to that particular road, failing in which, the statute will be enforced, and successful in which, as to that particular road
359 the statute will not be enforced.

The case of R. R. v. McKendree, (203 U. S. 514), is not in point, because there the question was with reference to an order of the Secretary of Agriculture which was void in part and was not separable, it not being possible to eliminate the valid from the void features.

The Cotting case, (183 U. S. 79), was decided by reason of an entirely different principle. The statute in that case on its face shows that a company doing little business was not to be regulated, while the company doing much business was made subject to the statute. And by reason of that vice, the statute was held void. That the Cotting case is not in point, see:

St. Louis &c., v. Illinois, 185 U. S. 207.

McLean v. Arkansas, — U. S. — (January 4, 1909).

The Connelly case, (184 U. S. 540,) was likewise decided in part at least because the statute did not apply to all classes of persons engaged in a like business, and that the statute was not separable, the valid from the invalid.

The case of Ju Toy, (189 U. S. 253,) the Trade Mark cases, (100 U. S. 82,) and the recent case of Howard v. R. R. (28 Sup. Ct. Rep. 141,) were decided by reason of this same principle namely, as to whether the statute is separable or not.

Therefore the holding is that these statutes are not void upon their face, and cannot be declared void for the one reason that the evidence shows that they are not enforceable as to two or more roads.

8. The state earnings are made known to a certainty, concerning which the experts on both sides agree. And whether in earning them the company gains a profit, or sustains a loss, is dependent upon the expense in making such earnings. Some of these expenses can be definitely specified, but others, like maintenance of way, salaries of all officers including ticket agents, handlers of freight, terminal expenses, compensation of many laborers, and other things,
360 are all occasioned for carrying both freights and passengers, state and interstate, and miscellaneous of each. And herein is the problem how to make the apportionment.

The track mile or train or car mile does not furnish the solution, because everyone agrees that neither of those methods will do, and

no one of the experts or counsel on either side asks for such a solution. There fore there is and can be but one of two methods adopted. Neither can be relied upon if mathematical precision is demanded. But the one more nearly correct and satisfactory, is the one to be adopted. And that is what is done in litigation concerning injuries and death; the age, earning power, loss of time, can be fixed, some with certainty. How many years the party had before him is fixed by mortality tables, wholly unreliable as to the individual, but fairly certain as to the average.

In taking property under the power of eminent domain, we know the assessed value, the amount of taxes, the rents, and maintenance. Some or all these elments are put in evidence, while all other is matter of opinion, concerning which witnesses and jurors differ. And so it is in most litigation.

9. The theory to now recognize must be either the proportion of earnings, state and interstate, or ton and passenger mile.

That it costs more to carry either freight or passengers proportionately for a short than a long haul, is undoubtedly true, although all the elements are not more expensive. Local trains generally have poorer and older and cheaper cars and locomotives. But their speed is greater between stations. There are many stops. They carry proportionately much greater dead weight. They do much switching, and there are many delays. Their crews are paid more proportionately to distance and what is carried. The trains are daylight trains only. With freight the carload and number of cars are much the less, and from station to station grows less, and is largely made up of single parcels, boxes, and individual shipments from as many consignors to as many consignees, first put in one station, and at
361 the end of the trip into another station by the company.

Usually there are two terminals, comprising an enormous amount of the investments and expenses of the company. The local train is seldom loaded to the capacity of the engine, to the loss of much of the investment and expense. The clerk hire, selling tickets, issuing bills of lading, making expense accounts, and auditing and making records, are attended with like expense for the small and the large items. Many stations would be done away with but for local business.

In nearly every instance enumerated, as to the interstate, which includes trans-state, the reverse is true, although much magnified in my opinion as to terminals, and particularly as to trans-state, because in my judgment some of the interstate business has two terminal expenses within the state. The two gateways in Missouri through the one or the other of which a large percentage of business both interstate and trans-state passes, are Kansas City and St. Louis. And at both of those places the investments are very large, and of course whether owned or rented, the expense is practically the same. But these terminals are for both. And while I believe the terminal expenses at St. Joseph, Kansas City and St. Louis as to trans-state business is minimized, I do not agree with the experts, who claimed that there are none of those expenses. Their cross examination shows this to be a mistake.

But from the great weight of the testimony, it can well be said that the ton mile is not reliable, and the revenue is more nearly correct, as showing that it costs more by twenty-five per cent, to carry passengers, and fifty per cent to carry freight locally than it does when interstate. Generally speaking this is undoubtedly true. There are exceptions, one of which is shown by the Burlington with its three roads from St. Joseph, the one to Villisca, Iowa, another to Creston, Iowa, and a third to Chariton, Iowa. They are all interstate roads, each with two terminals, but each operating only local and daylight trains. The Wabash illustrates this with roads across teh arbitrary state line between Missouri and Iowa. And there are other illustrations, but less noticeable, in the testimony.

362 But all these are exceptions and the testimony establishes the rule as stated.

The Missouri Legislature has recognized the proposition in all of its rate statutes, and particularly in the statutes now assailed, that it costs more per mile for a short than a long haul.

See Act approved April 14, 1905; and the Act of April 15, 1905, covered by the original bills herein. The passenger rate statute under consideration fixes a two cent fare for all trunk lines, and four cents per mile for a road less than forty-five miles in length.

The freight rate statute under consideration, in every schedule recognizes the principle that proportionately there should be more charged for a short than a long haul. For instance, Class D allows a charge of five cents per hundred for carload lots for the first twenty-five miles, and one-half cent for the second and additional twenty-five miles.

And commencing with the statute of Pennsylvania of 1846 chartering the Pennsylvania road, to the present time, every statute upon the subject fixing freight rates, and many of them fixing passenger fares, recognizes this principle. So that while it is a legislative function to fix rates, we have innumerable legislative recognitions of the greater cost for weight per mile for a shorter than a longer haul, and in some instances as to passengers. And no state has so recognized this to a greater extent than has the Missouri Legislature.

And the courts passing upon the question, have invariably recognized this as being so, and that the revenue theory is the correct one as against the ton mile.

This was so recognized by the Supreme Court of Pennsylvania in case of Railroad v. Pennsylvania County, 68 Atl. Rep. 677, but not discussed.

In R. R. Co. v. Tomkins, 90 Fed. 363, Judge Carland, of the South Dakota District, in passing on the statutes of that state, said:

363 "This Court believes that it is fair and just to first ascertain what per cent. of the total gross earnings in any one year the total local earnings are for that year, and having ascertained that per cent. to take the same per cent. of the total value of the property as a fair value upon which to fix local earnings."

The decree was reversed and although an equity case, remanded because of a failure to make a material finding. (176 U. S. 167).

The same case under the title of R. R. Co. v. Smith, 110 Fed. 473, on final hearing resulted in a decree enjoining the rates, and the question of expenses was arrived at by the extra cost and on the revenue theory.

The case of R. R. Co. v. Keyes, 91 Fed. 77, is an opinion by District Judge Amidon, concurred in by Circuit Judge Thayer, enjoining North Dakota statutory rates. The argument of the opinion condemns the ton mile theory, and adopts the revenue theory. The criticism of the case is, that conditions in sparsely settled North Dakota are not like those in this state. But the question of which theory was the more accurate for computation, was fully covered, and the ton mile was condemned.

In re Arkansas R. R. Cases, (163 Fed. 141,) decided but a few months since by Judge Van Devanter of this Circuit, a temporary injunction was issued against the enforcement of the Arkansas statutory freight and two cent passenger rates. And in most respects the State of Arkansas with reference to rates is like that of Missouri, especially the south half of Missouri. Judge Van Devanter in discussing this question said:

"'Other standards are suggested, but the proofs indicate that none of them is as satisfactory or accurate as is the difference in cost in its relation to the revenue."

And the proofs, including statistics and tables and some of the same expert witnesses on each side, were the same as in the cases at bar.

The great case from Nebraska of Smyth v. Ames, was heard on the Circuit by Justice Brewer on oral testimony, as the cases at bar have been heard. The entire discussion of the question by Justice Brewer in a lengthy opinion on the extra cost and revenue
364 theory, entirely ignoring the ton mile theory. That case resulted in the state statutory freights being enjoined by Justice Brewer, District Judge Dundy concurring.

The case was carried to the Supreme Court, (169 U. S. 467,) resulting in an affirmance of Justice Brewer's decree. The opinion of the Supreme Court by Justice Harlan is exhaustive, and the tables used by him to show the facts, and the entire argument is with reference to the extra cost and revenue theory, utterly ignoring the ton mile theory.

Recurring to the Tomkins case, (90 Fed. 363,) above alluded to, that case was reversed by the Supreme Court, (176 U. S. 167,) and the question of fact was only discussed from the revenue theory. The reversal was only because the lower court recited that it was unable to ascertain what was the actual cost of earning the local earnings for certain years. But as the lower court on the first hearing proceeded on the extra cost and revenue theory, and as that was what was discussed by the Supreme Court, and under the Mandate the case went to decree, (110 Fed. 447,) on the revenue theory, I am convinced that the Supreme Court for the guidance of trial courts has adopted the revenue theory as the one more just and equitable both to the patrons of the road and to the companies.

So that we have the Supreme Court in the two cases recognizing

the revenue theory. Two Circuit Judges of this Circuit have so held. And the same holdings have been made by at least three District Judges, and the Supreme Court of Pennsylvania impliedly, although the argument in that opinion is not strengthened by reason of a statement as to the measure of proof, concerning which the minority opinions without doubt are correct.

As an argument against the revenue theory, and for the ton mile theory, no court has spoken in so far as counsel on both sides and I are advised. In some phases this is a question of fact, or logic, or argument, or opinion, partaking of all. But so many eminent courts have thus spoken, even though not a question of law, and even though the traffic in the states differ, yet such opinions tend most strongly to create an undoubted belief that the cost for
365 carrying both passengers and freight locally is greater proportionately than for doing a long or interstate business, and that the revenue theory is the only one to apportion the cost of each business.

The Wisconsin Railroad Commission made an exhaustive and thorough investigation of these questions two years since. Evidence of both sides was heard. Experts interested, and those not interested, testified. Many months of time were given to the hearing and in reaching conclusions. A valued report was the result. The findings and conclusions were:

1. The cost of carrying local and state freight is greater than for carrying interstate freight and passengers.

2. That this extra cost must be considered, and then take the gross earnings as the basis upon which to allot expenses between the state and interstate business.

3. That less than two and one half cents per mile for local or state passengers was not remunerative in the State of Wisconsin.

10. When the statutes in question were enacted, it was believed by many that by reducing the fare, there would be much more travel. For a month or so this proved to be true. But with the novelty gone, the testimony shows that the increase has been less than three per cent, and more nearly one per cent.

It was likewise believed by many that with the abolition of passes and other forms of free transportation, that expenses would be lessened and receipts increased. Ministers sometimes received free transportation, but generally at half rates. Many lawyers and doctors received passes under guise of retainers for services never performed. Bankers received them under the claim that it was compensation for signing bonds, and cashing Chicago and St. Louis exchange. Politicians demanded, extorted and received them for supposed influence. Officials received them as a courtesy. Many newspaper concerns received them, from the proprietor and editor-in-chief down to the typesetter, (relatives included,) under the pretense that it was an exercise of liberty of contract, for which the newspaper published the arrival and departure of trains, with an occa-
366 sional local and sometimes abbreviated plate matter. To receive them was often followed by charges of corruption and to refuse them, by charges of demagogy. Every person conceded it to

be a wrong system, and most people were advocates for its abolition, except as to the class to which he belonged. But it was abolished, and does not longer exist, and the evidence shows that as to state earnings, the passenger revenue is increased by reason thereof less than one per cent.

11. This leaves but one question for decision and that question largely one of fact. The question is whether the traffic wholly within the State of Missouri generally referred to in the evidence as local traffic, can be carried under the freight rate statute of 1907 and the passenger fare statute of 1907 at such profit as will give a reasonable return after paying expenses upon the investment, or whether such traffic is carried at a loss or less than such reasonable profit.

Thousands of pages of testimony taking weeks of time, have been filed. This testimony was orally presented, part to the Master, and part of the Court, accompanied with volumes of statements, reports, schedules, and tables. Every phase of every question of both debit and credit has been worked out, tabulated, and filed. These exhibits are the result of something like one year of work by the expert accountants representing both sides, as a result of their examinations of train reports, waybills, auditors' books, and of the accounts of the passenger and traffic departments of the several roads. This work required not only much time, but energy, and patience, and learning, and great skill. But each side had accountants of the highest character, and possessing all of those qualifications. The four accountants, Mr. Peabody, and Mr. Johnson representing the railway companies, and Mr. Taliaferro and Mr. Hamilton representing the State, impressed me after hearing them testify and being in consultation with them for ten days after the cases were submitted, that the sole purpose of their work was to exhibit the
367 truth, differing only as to extra cost, and that difference of extra cost largely confined to the local passenger traffic, and differing as to the theory as to how the expenses between local and interstate traffic within the state should be divided. Aside from those two questions there is not the slightest variance between the testimony of the experts upon the two sides. During the ten days following the submission of the cases, they and the Court being alone, at the request of the Court they prepared a statement in each of the nine cases submitted, which have been ordered filed. To each of the nine statements is appended a certificate showing the time covered, and that such statement correctly shows the results of the various assumptions set forth therein, which certificates were signed by the four expert accountants. Seldom, if ever, is a Court under greater obligations to expert accountants representing the two sides, than the Court and all parties, the railroads and the public, owe these four gentlemen. Usually experts representing different sides do not agree to anything. Here experts representing the different sides agree to everything pertaining to the accounting, the differences only arising as to the basis.

The Court is likewise much indebted to counsel on both sides, who for four days argued these cases with a fairness, and wealth of learning, and eloquence seldom displayed at the bar. And now

after the fullest investigation of the record, the Court has reached the conclusion that upon this question of fact the statutory rates fixed by either and both statutes are not remunerative. And it only remains for the Court to give the reasons for such conclusion.

And in giving these reasons, clearness is added by eliminating those things so clearly established by the evidence, or so nearly conceded in matters of law as not to be debatable.

1st. The unquestioned and undoubted rule is that there is a presumption both of fact and of law in favor of the validity of every legislative enactment. The railway companies have the burden of removing this presumption, and showing that the statute clearly, or as some Courts say, palpably, and others say, beyond
368 a reasonable doubt, that the statute is invalid. In these cases the Court has recognized this rule. The authorities upon this question form a long and unbroken line, with the single exception of the majority opinion in the Pennsylvania case decided a year ago. (68 Atl. Rep. 676). And that one authority is not persuasive.

2nd. All testimony and argument bearing upon the question as to what consideration the Legislature of Missouri gave to these enactments, is utterly immaterial. Much was said in argument as to the message of Governor Hughes of New York two years ago in declining to approve the two cent fare statute of that state. Governor Hughes had the moral courage to veto a measure of popular favor because as he believed the question had not been fully considered. But the relations of a governor to proposed legislation, and those of a Court to legislation consummated, are entirely different.

3rd. Most of laymen and many lawyers believe that the question is whether the railway company as a system is earning sufficient revenue upon the value of the property of the system. They believe that if the Burlington, Santa Fe, Wabash, or any other railroad system is earning such money as will pay all charges and expenses including taxes and interest, with reasonable dividends to the stockholders, that state rates for state business must stand. Of course no one believes this who has given the slightest attention to the question. That precise question was before, and was decided by, Justice Brewer, (64 Fed. Rep. 165), and affirmed by the Supreme Court in the Nebraska case of Smyth v. Ames, (169 U. S. 466). The only question is as to Missouri rates, less expenses properly charged againt the same. And if this balance does not leave sufficient to pay a reasonable return, the law is invalid. And if the railroad system of any company is earning more than a reasonable return by reason of interstate rates, which affect the people many times more than local rates, and if such interstate rates are too high, Congress either acting alone or through a Commission must
369 make the corrections.

The Supreme Court during the present year in the case of City of New York v. Consolidated Gas Company of New York (211, U. S. —) decided that six per cent was fair and right to be given to the owners upon the true valuation. My opinion is that while a gas plant is in some respects different from a railroad, that

a railroad property, properly built, and properly managed, should over and above expenses make a return of six per cent per annum. And considering all the evidence, the evidence fairly shows that all of these roads were properly and economically built and are being properly and economically managed, and that after paying the expenses for maintenance and operation, that there is less than six per cent. of returns, and not more than three per cent upon any of them and as to some of them a deficit, taking the property as above stated within the State of Missouri at its fair valuation. And this is so without reference to bonds, because in no case do the bonds bear six per cent interest. But taking the bonds into consideration, there is still not to exceed three per cent returns, and many cases a deficit afer considering all debits and credits, upon the true valuation for the state business. There is no evidence that any of the existing bonds were improperly issued either as to amounts or rates of interest. In fixing the value the Court has considered the evidence of witnesses as to the stocks and bonds outstanding, and the Court has considered the evidence of the fact that the Missouri State Board for taxing purposes has valued these properties. Of course those findings are not binding nor conclusive, but they are persuasive. But independently of stocks and bonds, and independently of what the State Board has valued these properties for taxing purposes, the evidence shows the valuations to be as recited in the findings of fact herewith filed, and to which reference will be made in the decrees.

It is absolutely necessary that many trains both passenger and freight do both a local and interstate business. Even the fast trains stopping at but few stations in the state carry state passengers between such stations. And the same is true as to
370 freight trains carrying freight both in carload and less than carload lots.

The valuation of the roads has been fixed by the Court as shown by the findings of fact. The entire state and interstate earnings of each of the roads within the state is known and fixed to a certainty. The expenses are known and fixed. To apportion these expenses, must be done according to one of the two theories, and the correct theory is that according to revenue. One theory or other must be applied to both freight and passenger expenses, and the Court should not adopt the one theory as to part, and the other theory as to another. The one theory is helpful to the one side, and the other theory helpful to the other side, the one theory to the one side in freight, and the other theory to the other side in passenger. But an arbitrary splitting of theories is illogical and unfair and cannot be recognized. The court has adopted the revenue theory because a great number of the best railroad experts of the country, against a very limited number to the contrary, have so testified. Every court that has ever had this question before it in so far as I am advised by the briefs of counsel and my own independent investigation has so held in the cases hereinbefore cited of the Supreme Court of the United States; in the two cases, by two Circuit Judges of this Circuit; by three District Judges of this Circuit, and by the Supreme Court

of Florida, State v. Atlantic Coast Line, (37 So. Rep. 657). And Beale & Wyman on Railroad Rates Regulation, Sec. 166, announces such as being the correct rule. The values of the property within the state have been fixed by the Court. The entire earnings within the State, interstate and state, freight, passenger and miscellaneous of each, have been fixed. The entire expense is known, including the extra cost of each. To ascertain whether the result is a profit, and if so what per cent, or a loss, is but a problem of primary arithmetic, as is shown by Judge Van Devanter in Arkansas Rate Cases, (163 Fed. Rep., 141). There are other methods equally simple, the resultant figures of course being the same. These computations show as to the commodities covered by the freight rates statute of 1907
371 that two roads, the Hannibal & St. Louis, and the Burlington, allowing nothing for extra cost, there is a deficit, and with all other companies less than two per cent. But with the extra cost added, the deficit for the two companies is much greater, and the other companies show a deficit.

The passenger earnings under the two cent fare law of 1907, allowing nothing for extra cost over interstate business, give no return whatever to the Rock Island, St. Louis & Hannibal, Kansas City, Clinton & Springfield, and the Great Western. The other companies will have the following: The St. Louis & San Francisco between three and four per cent; the Santa Fe between four and five per cent; The Kansas City Southern a small fraction over two per cent; the M. K. & T. between two and three per cent; the Burlington between three and four per cent. But all this is arrived at by allowing no extra cost of service. But to add the extra cost for freight and passenger, there are no earnings over expenses. This is confiscation under the Constitution.

It being a legislative act, and not a judicial one, this Court cannot fix rates. If it could, two and one-half cent passenger rates would be fixed for the stronger roads, and three for the others. But that is for the legislature acting itself with experts, such as the State employed in these cases, or through a Commission with like assistance.

In view of General Equity Rules prohibiting findings of fact, and other matters from being inserted in decrees, this opinion has been extended. And to further show how the court has considered the cases, and the various questions of fact covered by the voluminous evidence, findings of fact have been made and signed which will accompany this opinion.

Long and laborious as the work for the Court has been, I am of the opinion that the cases have been expedited by hearing the oral testimony as provided by General Equity Rule 67. It gave the Court a much better insight into the intricacies of the cases, and with a much better knowledge of the cases than could be gained by hearing exceptions to a Master's report. And I am fully compen-
372 sated by the belief that I have worked out the correct conclusions and with the knowledge that if I am in error, either as to fact or law, that the cases can be speedily heard de novo by the Supreme Court of the United States. Because I feel in all cases,

and in these cases more than ever before, as Judge Sanborn said in Boatmens Bank v. Fritzlen, (135 Fed. Rep. 650, 655):

"Every conscientious judge, every thoughtful man, upon whom is laid the grave responsibility and the heavy burden of determining the rights of his fellows, rejoices in the thought, wherever such is the case, that his decision may be reviewed, and that, if erroneous, it will not work irreparable injustice to him whom he deems it his duty to defeat."

The decrees will be for the complainants. Each party will pay the costs by such party made, except the compensation of the Master and stenographer. The half of those will be paid by complainants, and the other half by respondents. The reservation clause usual in such cases will be in the decrees.

Kansas City, Missouri, March 8th, 1909.

373 Afterwards, to wit, on the 17th day of April, 1909, a Supplemental Opinion was filed. Said Opinion is in words and figures as follows:

In the Circuit Court of the United States, Western District of Missouri, Western Division.

No. 2988. Equity.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Complainant,
vs.
HERBERT S. HADLEY et al., Respondents.

And Equity Cases Nos. 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3006.

Supplemental Opinion.

SMITH MCPHERSON, *Judge:*

These cases are pending on a motion to modify the decrees and opinion filed March 8th, 1909.

1. The costs were taxed, the one-half to the railway companies, and the one-half to the state officers. The company being successful, it is contended that the taxable costs aggregating about eighteen thousand dollars should all be adjudged against the state officers.

In actions at law, in the absence of a tender or statutory offer to confess judgment, the costs follow the judgment. In equity cases such is the general rule, but not the invariable one. The award as to costs is discretionary.

Two things influenced the court in dividing the costs herein.

First. Defendants are officials, and as officials are representatives. They have no personal interest in the litigation. This of itself is not enough to avoid the costs, but it is to be considered. It will be presumed that the legislature will appropriate a sufficient amount to protect these officers. But this is not always done. The last

legislature appropriated $40,000.00 for these cases, which was but two-thirds enough for the two years. The Master in Chancery and the lady stenographer gave a great deal of time, followed by very large, but justly owing bills, the one-half of which has been paid by the railways, and by the state nothing with the appropria-
374 tion exhausted. Whether the other half is paid all depends upon what the legislature does.

Second. The more sufficient reason for dividing the costs is because of the extravagantly enormous record made in the cases. The Master gave many weeks to taking evidence, and many more weeks were given by the court in taking evidence. Both the Master and the Court were powerless to abbreviate the record, because the Supreme Court in the case of Blease vs. Garlington, 92 U. S. 1, and the Circuit Court of Appeals for this Circuit in case of Schubert vs. Woodward, 167, Fed. Rep. —, 52, have held that Trial Courts must receive in equity cases, all evidence offered that is germane to the issues. I complained, and in effect gave warning many times to the parties, but without avail, because of the prolixity of the record. Something like 15,000 pages of evidence were taken, when one-third would have been as strong a presentation of either side. Courts should impose penalties for this, and the only penalty is by way of costs. Both sides were at fault, and both sides should bear the burden. It does not follow that such a precedent will be one to plague. It is not a precedent to be followed except in cases where it ought to be followed.

2. Complaint is made because of the recital in my opinion that, "It being a legislative act, and not a judicial one, this court cannot fix rates. If it could, two and one-half cent passenger rates would be fixed for the stronger roads, and three for the others. But that is for the legislature acting itself with experts, such as the state employed in these cases, or through a commission with like assistance.

My statement that "It being a legislative act, and not a judicial one, this court cannot fix rates," is not controverted by anyone. This being so, as of course, what I said as above is obiter dictum. But becaues it is dictum, is no reason whatever for not saying it, and still less a reason for now eliminating it from my opinion. The greater part of one of the greatest opinions ever written by the great Chief Justice (Marbury vs. Madison), was dictum. But even if it
375 were possible, who would dare to mutilate that opinion? But two years since there were published two very large volumes wholly covering dictum only of the United States Supreme Court. Those dicta were and are binding on no one, but they contain much of the cream of our jurisprudence. This dictum of mine is binding on no one. It is my opinion, and will stand as of value, or of no value as the profession and informed laymen fix the value thereon. I believes it proper to say that the strong roads should have two and one-half cents per passenger per mile, and the weaker roads three cents. I could have fairly stated that the St. Louis and Hannibal, and the Kansas City, Clinton & Springfield Railroads should have four cents or more per passenger mile.

I still adhere to these views, and entertaining them, I know of no

reason for not stating them, with reasons for believing it was my duty to state them. Passengers, like consumers, have rights. One of those rights is to have fares fixed reasonably low. But the term reasonable is a comparative one. It must be in proportion to what it is worth, and the better the service, the more it is worth. And the public is entitled to have, with the right to demand, efficient service, provided always such is paid for. Much in argument was said by counsel on both sides as if an arbitrary flat rate is all that is involved, regardless of service and regardless of all other things. Whether the trains are expensive or inexpensive, daylight or night trains, through or local trains, main line or branch trains, roads through the hills of central Missouri, or the Ozarks or over the prairies, and whether the trains carry few or many passengers, are matters largely passed over as if of no importance. To me they seem of great importance. So it is as to the greatly increased cost of materials compared with ten years ago. The average fare paid per year, aside from the low excursion rates, is less than six dollars per year, commercial travelers excepted. To reduce that to four dollars, thereby saving two dollars, is of course of importance. So are other matters of importance. Aside from having efficient service to be paid for at remunerative rates, the laboring men, the employés, have rights. They have the right to be well paid for their work, in day time and night time, sunshine and storm, during the excessive heat of the summer and the rigors of winter. Their hazardous
376 and most dangerous service entitles them to remunerative compensation, which they cannot have with meagre earnings of the roads. Evidences of humanity and kindly feeling for their fellow men need not be wholly displaled toward the man who pay-six dollars per year for passenger fares. A kindlier disposition would suggest an equitable division of sympathy. Thousands and thousands of them have already been "let out" because of decreased earnings, and more are to follow, with diminished compensation for those from necessity retained. What is the truthful answer to make these men, and who is to make this answer? It is doubtful if the legislature thought this out. I decline to modify my opinion as respects this.

3. It is contended that the court was in error in its original opinion in that the penalties of the statutes render them void.

Whether rates prescribed by statute are valid or invalid, is a judicial question, and the legislature cannot prohibit the courts from passing thereon. This was so stated in the Minnesota Milk case, 134 U. S. And this cannot be done indirectly, by imposing such penalties as to terrorize the company, its officers and agents so that they do not dare to litigate the question. This was so held in ex parte Young but a year ago.

This question received but little attention from any of the counsel or the court, and was but briefly discussed by the court in the opinion.

In the Consolidated Gas case in 146 Fed. Rep., 150, Circuit Judge Lacombe held that a penalty of $1,000.00 for each charge for gas in excess of the statutory or commission rate was prohibitive and a denial of the right to go into the courts. And on the final hearing

of the same case in 157 Fed. Rep., 849, 881, a like holding is made. And in the same case on appeal, the Supreme Court held a year ago that the penalties were so excessive as to be void.

The discussion by Justice Brewer speaking for the court, in the case of Cotting vs. Kansas City Stock Yards, 183 U. S., 79, 99, is to the same effect, although the question was not decided. And a like discussion, with a like putting the question aside without a decision, is found in the Reagon case in 154 U. S.

377 And in the ex parte Young case, although the penalties were more severe than under the Missouri statutes, the question is at rest. The sole question is—Can a party be allowed to litigate a disputed question of fact as to property rights, without confiscation of all its property, and all of its agents being sent to jail, if the case is lost? Surely he can. Upon reflection and with much additional consideration, the holding now is that the section imposing penalties is void.

But this is largely an academic question, for the reason that the penalty section is easily separated from the main features of the statute. And I need not discuss the proposition that when separable, the void section does not render the entire statute void.

4. These cases as to freight were brought four years ago. Two years ago supplemental bills were filed, bringing forward the new freight rate statute, and the passenger rate statute. Upon a hearing by agreement of counsel on both sides, a temporary injunction was issued against the enforcement of the freight rate statute. The railways asked for a temporary injunction against the enforcement of the passenger rate statute. The Attorney General and his associates contested this, and were successful to the extent that the court ordered an observance of the statute for some months, until information from actual tests could be made. So that from the very inception of the case, it has been contended on the one side that the statute is invalid, and on the other side that the statute is valid. It therefore follows that this court has had jurisdiction for four years over all the parties, and over the entire subject matter of state earnings.

It is clear that this court having such jurisdiction should retain it over all the parties, and the subject matter, to the end that the decrees hereafter may be enlarged, or modified, as varying circumstances and the acts of the parties may require. Therefore the decrees should be so changed as to recite such reservations.

Kansas City, Missouri, April 17th, 1909.

378 UNITED STATES OF AMERICA, *sct:*

I, Adelaide Utter, Clerk of the Circuit Court of the United States, for the Western Division of the Western District of Missouri, do hereby certify that the above and foregoing is a full, true and complete copy of the record, assignments of errors and all proceedings in the cause wherein The Chicago and Alton Railway Company is complainant and John A. Knott, et al., are defendants, on the appeal of the defendants and the cross-appeal of the complainant, as

required by the stipulation of parties on file in said cause and set out on pages 315 and 316 supra.

Witness my hand as clerk and the seal of said Court. Done at office in Kansas City, Missouri, this first day of May, A. D. 1911.

[Seal of the United States Circuit Court for the Western District of Missouri, Western Division.]

ADELAIDE UTTER, *Clerk.*

Endorsed on cover: File No. 22,780. W. Missouri C. C. U. S. Term No. 704. John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad and Warehouse Commissioners, and Elliott W. Major, Attorney General of the State of Missouri, appellants, vs. The Chicago & Alton Railway Company. File No. 22,781. Term No. 705. The Chicago & Alton Railway Company, appellant, vs. John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad and Warehouse Commissioners, and Elliott W. Major, Attorney General of the State of Missouri. Filed June 26, 1911. File Nos. 22,780 & 22,781.

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911

75109

130	Knott *et al.* v. C. R. & Q. R. Co.
134	C. R. & Q. R. Co. v. Knott *et al.*
672	Knott *et al.* v. St. L. & S. F. R. Co.
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678	Knott *et al.* v. C. R. I. & P. R. Co.
679	C., R. I. & P. R. Co. v. Knott *et al.*
680	Knott *et al.* v. St. L., K. C. & C. R. Co.
681	St. L., K. C. & C. R. Co. v. Knott *et al.*
682	Knott *et al.* v. K. C. So. R. Co.
683	K. C. So. R. Co. v. Knott *et al.*
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685	St. L. & Hannibal R. Co. v. Knott *et al.*
686	Knott *et al.* v. Mo. Pac. R. Co.
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689	St. L., I. M. & S. R. Co. v. Knott *et al.*
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692	Knott *et al.* v. O., O. & K. C. R. Co.
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697	St. J. & G. I. R. Co. v. Knott *et al.*
698	Knott *et al.* v. K. C., C. & S. R. Co.
699	K. C., C. & S. R. Co. v. Knott *et al.*
700	Knott *et al.* v. C. G. W. R. Co.
701	C. G. W. R. Co. v. Knott *et al.*
702	Knott *et al.* v. C., M. & St. P. R. Co.
703	C., M. & St. P. R. Co. v. Knott *et al.*
704	Knott *et al.* v. C. & A. R. Co.
705	C. & A. R. Co. v. Knott *et al.*

FILED
MAR 25 1912
JAMES H. McKENNEY,
Clerk.

MISSOURI RATE CASES.

Appeals Nos. 130, 672-704 (even numbers) and Cross Appeals Nos. 134 and Nos. 673-705 (odd numbers) from the Circuit Court of the United States for the Western Division of the Western District of Missouri.

MAPS

Index to Maps.

MAP NO.

1. Illustrating the Interdependence of State and Interstate Rates.
2. Illustrating the Control of the Missouri State Rates on Traffic from Chicago to Missouri River Points.
3. Illustrating the Rate Basis in Effect from Seaboard Territory to the Mississippi River.
4. Showing Control of Missouri State Rates on Traffic from East of Mississippi River to West of the Missouri River.
5. Illustrating Missouri State Control of Eastbound Grain Rates.
6. Showing why all lines between same points must charge the short line rates on Passenger traffic, and how Interstate rates are controlled by State rates.
7. Showing Effect of State Passenger Rates on Through Passenger Traffic.
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9. Illustrating the Situation at St. Louis.
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MAPS

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MISSOURI RATE CASES.

Illustration of the Working of the "Revenue Theory" of Dividing Expenses.

Estimate that

Total State freight revenue in Missouri is	$2.00
Total interstate freight revenue in Missouri..	8.00
Total.....	$10.00
Estimate that expenses are 75% of gross earnings....	7.50
Net profit on entire freight business.....	$2.50

If it costs 3 times as much *"in proportion to revenue"* (which was Mr. Sturgis' lowest estimate) to do the State freight business as to do the interstate freight business, the division of the total freight expense between the two kinds of business and the allotment of its proper share to each kind is made in the following manner:

Multiply the State freight earnings by 3 and add the sum so produced, to the interstate earnings, thus:

2 x 3.....	6
Interstate earnings	8
Total.....	14

The total freight expense is then divided and charged as follows:

State freight expense.....	6/14
Interstate freight expense.....	8/14

With the following result:

6/14 (State freight proportion) of $7.50.....	$3.21
8/14 (interstate freight proportion) of $7.50...	$4.29
	$7.50

The net result then is as follows:

State freight expense.....	$3.21
State freight earnings.....	$2.00
Deficit on State freight business.....	$1.21
Interstate freight earnings.....	$8.00
Interstate freight expense.....	$4.29
Net profit on interstate freight business..	$3.71

If it costs 50% or one-half as much more "in proportion to revenue" (which was the estimate of the circuit court) to do the State freight business as to do the interstate freight business, the division and allotment of total freight expense is made in the following manner:

Multiply the State freight earnings by 1½ and add the sum so produced to the interstate freight earnings, thus:

2 x 1½.....	3
Interstate freight earnings.....	8
Total.....	11

The total freight expense is then divided and charged as follows:

State freight expense.....	3/11
Interstate freight expense.....	8/11

With the following result (approximate):

3/11 (State freight proportion) of $7.50.....	$2.04
8/11 (interstate freight proportion) of $7.50...	$5.46
	$7.50

The net result then is as follows:

State freight expense.....	$2.04
State freight earnings.....	$2.00
Deficit on State freight business.....	$0.04
Interstate freight earnings.....	$8.00
Interstate freight expense.....	$5.46
Net profit on interstate freight business.	$2.54

The average earnings *per ton per mile* of the Chicago, Burlington & Quincy Railway Company in carrying on its interstate freight business in Missouri was .008265, *i. e.*, 8¼ mills and a fraction.

The average earnings *per ton per mile* of the company in carrying on its State freight business in Missouri was .017032, *i. e.*, 17 mills and a fraction.

The proportion was approximately the same in cases of some of the other companies.

If it be assumed, for the purpose of facilitating the computation, that the revenue *per ton mile* was exactly twice as great in the case of State as of interstate business, it is obvious that a division of total expense which charges to the State business 3 times as much expense "in proportion to revenue" as it charges to the interstate business is the equivalent of charging to the State business 6 *times* as much *per ton mile* of the expense as is charged to the interstate business *per ton mile.*

And an allotment which charges, as the expense of the State business, 50% more "in proportion to revenue" than is charged to the interstate business (as was done by the circuit court), is the equivalent of charging to the State business 3 *times* as much *per ton mile* as is charged to the interstate business *per ton mile.*

Illustration of the Working of the "Ton Mile Theory" of Dividing Expense.

Estimate, as in the previous illustration, that State freight revenue is	$ 2.00
Interstate freight revenue is	$ 8.00
Total	$10.00
Expense is 75% of gross earnings	$ 7.50
Net profit on entire freight business	$ 2.50

Estimate, for the purpose of facilitating the computation, that the average revenue *per ton mile* from the interstate freight business is 10 mills (1 cent); and that the State business is twice as great, 20 mills (2 cents).

Transporting 800 ton miles of interstate freight produces	$8 00
Transporting 100 ton miles of State freight produces	$2.00

Estimate that it costs 30% more *per ton mile* to handle State freight than interstate freight (this was the outside estimate of the experts for the State).

Pursuing the same method as in the other illustration, the number of ton miles of State freight must be increased by 30%, and the result of the increase added to the number of ton miles of interstate freight, thus:

State freight, 100 ton miles x 1 30/100	130 ton miles
Interstate freight	800 ton miles
Total	930 ton miles

The total freight expense is then divided and charged as follows:

State freight expense, 13/93.
Interstate freight expense, 80/93.
With the following result:

13/93 (State freight proportion) of $7.50.....$1.05
80/93 (interstate freight proportion) of $7.50.....$6.45

$7.50

The net result then is as follows:

State freight earnings.....$2.00
State freight expense.....$1.05

Net profit on State freight business.....$0.95

Interstate freight earnings.....$8.00
Interstate freight expense.....$6.45

Net profit on interstate freight business.....$1.55

If it costs 50% more *per ton mile* to handle State freight than interstate freight, the calculation would be as follows:

State freight, 100 ton miles x 1½.....150 ton miles
Interstate freight .....800 ton miles

Total .....950 ton miles

The total expense is then divided and charged as follows:
State freight expense, 15/95.
Interstate freight expense, 80/95.
With the following result:

15/95 (State freight proportion) of $7.50.....$1.19
80/90 (interstate freight proportion) of $7.50.....$6.31

$7.50

The net result then is as follows:

State freight earnings	$2.00
State freight expense	$1.19
Net profit on State freight business	$0.81
Interstate freight earnings	$8.00
Interstate freight expense	$6.31
Net profit on interstate freight business	$1.69

Further Illustration of the Working of the "Revenue Theory."

The foregoing illustrations were upon the assumption that the State revenue per ton mile was 2 times as great as the interstate revenue.

Suppose, now, that the State revenue is 4 cents and the interstate revenue is 1 cent per ton mile; *i. e.*, the State revenue is 4 times as great as the other, and the number of ton miles of each and the total expense the same as before.

The State revenue would be	$4.00
The interstate revenue	8.00
Total revenue	$12.00
Deduct total expense	7.50
Net profit	$4.50

Assume, as before, that it costs 3 times as much "in proportion to revenue" to do the State business as the interstate. The figures will be as follows:

4 (State earnings) × 3 =	12
Interstate earnings	8
Total	**20**

The total freight expense is thus divided and charged as follows:

State freight expense	12/20
Interstate freight expense	8/20

with the following result:

12/20 (State freight proportion) of $7.50	$4.50
8/20 (interstate freight proportion) of $7.50	3.00
	$7.50

The net result then is as follows:

State revenue	$4.00
State expense	4.50
Deficit on State freight business	.50

instead of $1.21, as in the first illustration.

Interstate reveune	$8.00
Interstate expense	3.00
Net profit on interstate business	$5.00

instead of $3.71, as in the first illustration.

That is, if the State revenue per ton mile be doubled and the interstate revenue per ton mile and gross earnings be left unchanged, the net profit on the interstate business *automatically* leaps from $3.71 to $5.00.

Further Illustration of the Working of the "Ton-Mile Theory."

Assume that the ton miles State and interstate revenue, State and interstate and total expense are the same, as in the last illustration:

800 ton miles of interstate freight at 1c. produces	$8.00
100 ton miles of State freight at 4c. produces	4.00
Total revenue	$12.00
Total expense	7.50
Net profit	**$4.50**

Assume that State expense is 50 per cent more *per ton mile* than interstate expense:

State freight 100 ton miles × 1½ =.....	150 ton miles
Interstate freight	800 ton miles
Total.....	950 ton miles

State freight expense would be.....	15/95
Interstate freight expense would be.....	80/95

with the following result:

15/95 (State freight proportion) of $7.50.....	$1.19
80/95 (Interstate freight proportion) of $7.50.....	6.31
	$7.50

The net result then is as follows:

State freight earnings.....	$4.00
State freight expense.....	1.19
Net profit on State business.....	$2.81

instead of 81 cents, the net profit shown in a previous illustration, in which the ton-mile revenue was 2 cents instead of 4 cents, as here. The *whole* of the increase of net profit consequent on the increase of the State ton-mile revenue is credited to the State freight business, *where it belongs.*

Interstate freight earnings.....	$8.00
Interstate freight expense.....	6.31
Net profit on interstate business.....	$1.69

The net profit on the interstate business remains as it was before, and *as it ought to remain,* because there has been no increase in interstate earnings and no change in the cost.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

NO. 326.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

vs.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

NO. 334.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, APPELLANT,

vs.

JOHN A. KNOTT, H. R. OGLESBY AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, ET AL.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR APPELLANTS IN NO. 326 AND APPELLEES IN NO. 334.

STATEMENT OF CASE.

In this case is drawn in question the validity of certain laws of the State of Missouri, fixing maximum rates for the

transportation, by rail, within the State, of certain commodities and of passengers.

An enactment of the General Assembly of the State, approved April 15, 1905, was as follows:

> "AN ACT, entitled 'An act to amend chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled 'Corporations, private,' by repealing section 1194 of said Revised Statutes, being part of article IV of said chapter concerning railroad classification—charges—commissioners, and to enact in lieu thereof the following new sections providing for the regulation of freight charges by railroads and the recovery of penalties for the violation thereof."

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. That section 1194 of the Revised Statutes of Missouri, 1899, concerning the regulation of freight charges, being part of article IV, of chapter 12, entitled "Corporations, private," be and the same is hereby repealed and the following, to be known as sections 1194, 1194a, 1194b, of said Revised Statutes, be enacted in lieu thereof, so that said sections shall be collocated between the existing sections 1193 and 1195 of said Revised Statutes of 1899.

Section 1194. No individual, company or corporation owning, operating, managing or leasing any railroad or part of railroad, designated in section 1191 as in classes A, B, or C shall demand, charge or receive a greater or higher rate for carrying from initial to terminal points in this state articles named in the several classes herein designated, than is hereinafter provided for, namely: Class D, in car loads of 40,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first 25 miles and not exceeding one-half cent per hundred pounds for the second 25 miles, or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional 25 miles or fractional part thereof. Class

E, in car loards of 24,000 pounds minimum weight, not exceeding 5 cents per one hundred pounds for the first 25 miles and not exceeding one-half cent per hundred pounds for the second 25 miles, or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional 25 miles or fractional part thereof. Class F, in car loads of 30,000 pounds minimum weight, not exceeding 5 cents per one hundred pounds for the first 25 miles and not exceeding one-half cent per hundred pounds for the second 25 miles, or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional 25 miles or fractional part thereof. Class G, in car loads of 30,000 pounds minimum weight, not exceeding 5 cents per one hundred pounds for the first 25 miles and not exceeding one-half cent per hundred pounds for the second 25 miles, or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional 25 miles, or fractional part thereof. Class H, in car loads in common cars, measuring inside from 29 feet to and including 30 feet and 6 inches in length (to be known as standard cars) not exceeding $6.00 per car load for the first 25 miles, and not exceeding $3.00 per car load for the second 25 miles, or fractional part thereof, and not exceeding $2.00 per car load for each additional 25 miles, or fractional part thereof, of over twelve miles. For the carriage of any of the articles comprising class H in cars of other lengths for the distances above specified, the following percentages of the foregoing rates per car load shall not be exceeded, namely: In cars of length less than 29 feet, 94 per cent.; in cars of length over 30½ feet to and including 32 feet, 104 per cent.; in cars of length over 32 feet to and including 33 feet and 9 inches, 107 per cent.; in cars of length over 33 feet and 9 inches to and including 36 feet, 110 per cent.; in cars of length over 36 feet to and including 38 feet, 113 per cent.; in cars of length over 38 feet to and including 40 feet, 116 per cent.; in cars of length over 40 feet to and including 42 feet, 125 per cent.; in cars of length over 42 feet to and including 44 feet, 135 per cent.; in cars of

length over 44 feet, 140 per cent. of the rates herein specified for cars of the standard length of 29 feet to and including 30 feet and 6 inches, shall not be exceeded. All the foregoing lengths to be taken by inside measurements. Class I, in car loads of 20,000 pounds minimum weight, not exceeding $4.00 per car load for the first 25 miles and not exceeding $2.00 per car load for the second 25 miles, or fractional part thereof, and not exceeding $2.00 per car load for each additional 25 miles, or fractional part thereof. (Class) In computing the rate of freight according to the provisions of this article, the distance shall be computed from the point where it is received to the point of destination in the state, notwithstanding it may pass from one road to another.

Section 1194a. That for the violation of the foregoing sections the railroad company so offending shall forfeit and pay to any person thereby affected the freight rate charged, demanded, or received in excess of the rates prescribed in said section, together with all actual damages caused thereby, to be recovered in any court having jurisdiction thereof by the existing law. And [if] the plaintiff in such action recover judgment therein, the court shall treble the same and the plaintiff shall, on motion, be allowed a reasonable attorney's fee for bringing the action.

Section 1194b. All acts and parts of acts, and all rules and regulations, freight schedules, classifications and groupings by railroad companies or the railroad and warehouse commissioners of this State in conflict with the provisions of this act are hereby repealed and declared void."

(Record Vol. 1, pp. 6-7, Mo. Sess. Acts 1905, 192.)

Section 36 of article IV of the Constitution of the State, providing that no law passed by the General Assembly should, except in case of an emergency, go into force until ninety days after the adjournment of the session at which it was enacted, and the General Assembly having adjourned March

18, the foregoing enactment went into effect June 16, 1905. (Missouri Session Acts, 1905, p. 330.)

The act fixed maximum rates for the transportation of certain commodities *in carload lots only*. Its effect, as a whole, was to reduce the rates for the transportation of such commodities below those which had been previously charged by the carriers under authority of law and with the approval of the Board of Railroad and Warehouse Commissioners.

June 16, 1905, the date the act took effect, the railroad company, as complainant, instituted this suit (Record, Vol. 1, p. 1) by filing in the court below its bill of complaint against the Attorney-General of the State, the members of the Board of Railroad and Warehouse Commissioners, and certain other persons alleged to be shippers. An order was at once issued, without notice to the defendants, restraining them from taking any steps to enforce the act or those provisions intended to secure obedience to it. (Record, Vol. 1, pp. 15-16.)

The bill averred that the complainant was a citizen of Iowa, maintaining and operating about 1,100 miles (Record, Vol. 1, pp. 1-2) of railroad in Missouri; that certain acts of the Legislature of Missouri, mentioned in the bill and including the act of 1905, were unconstitutional, violative of the provisions of the Constitution of the United States and the amendments thereto, and contrary to the Constitution and laws of the United States. (p. 2.)

It alleged the passage of the act of 1905, and averred that it would take effect June 16, 1905 (pp. 5-6). That the rates then being charged by the complainant for the transportation of freight of the character mentioned in the act, as shown in the schedules then on file with the Railroad Commissioners and posted in complainant's railroad stations, were in excess of the maximum rates fixed in said act, so that if the same were permitted to be enforced, it would require such a reduction in complainant's rates as to make imperative a

change in said schedule, and that such change the complainant did not propose to make and could not make without jeopardizing its property interests.

That the Railroad Commissioners proposed and threatened to and would, unless enjoined, enforce the provisions of said act by entering upon investigations on its own instigation and upon the complaint of shippers, and by determining complainant's said schedule of rates to be unreasonable, unjust and extortionate, for the reason that they were unauthorized by the act of 1905, and by requiring the complainant, under the pain of large penalties threatened to be enforced, to file and publish a new schedule of rates not in excess of those fixed by said act of 1905. That the Railroad Commissioners proposed to file and publish, as the complainant's schedule, the maximum rates fixed by said act, if the complainant should refuse to do so, and that they proposed to direct the prosecuting attorneys in the counties through which the line of complainant's railway runs to prosecute and recover of the complainant the penalties provided by law, and to direct the Attorney-General to assist in such prosecutions, and to direct the Attorney-General to prosecute the complainant and recover the penalties provided by law for its failure to comply with the orders which the Railroad Commissioners proposed, from time to time, to make in investigations instituted for the enforcement of said act of 1905, by compelling the complainant to adopt rates in accordance therewith.

Certain shippers were also made defendants, upon the theory that they represented all shippers as a class (pp. 8-9).

The bill charged the act of 1905 to be unconstitutional and inoperative for the following reasons:

(a) Because the act prescribed unreasonable rates which, if enforced, would confiscate the property of the complainant and require it to carry the commodities therein specified, and

to conduct its entire freight and other local traffic in the State for a sum which would not pay the actual operating expenses necessarily incurred in performing the service, and for that reason was violative of the Constitution of the United States, and particularly of the Fourteenth Amendment thereto, prohibiting the taking of property without due process of law, and guaranteeing to all persons the equal protection of the laws (p. 9).

(b) Because the act was discriminatory for the reason, as was averred, that while the cost of transporting live stock was greater than that of any other commodities in which a reduction was made, yet the act fixed the rate therefor much lower than that fixed by it on salt, cement, lumber, lath and shingles; and that the unequal, partial and arbitrary reduction in rates upon articles affected by said act of 1905, as compared with other commodities and between the different commodities themselves, mentioned in the act, worked an injustice between the shippers, producers and manufacturers of the State, deprived them of their property without due process of law and denied to them the equal protection of the laws, and also deprived the complainant of its property without due process of law, and denied to it the equal protection of the law, in this, that the Legislature having previously established maximum rates or charges for the transportation of all kinds of property, which were presumably fair and reasonable, did, by the act of 1905, attempt to further regulate the affairs of the complainant and require it to discriminate in favor of certain persons and shippers and give them transportation for a less rate than the general rate theretofore fixed by law, or than was just and reasonable in view of the cost to the carrier or the value of the service rendered to the shipper (pp. 9, 12-13).

(c) Because the act provided that in computing the rate of freight the distance should be computed from the

point where it was received to the point of destination in the State, notwithstanding it might pass from one road to another; that this impaired complainant's freedom of contract, and fixed for it a rate based upon carriage over the line of another road, whereby the provisions of the Federal Constitution and the amendments thereto, theretofore referred to, were violated, and the freedom of contract guaranteed by section 4 of article II of the Constitution of the State was denied (p. 9).

(d) Because it attempted to adopt and create, as part of article IV of chapter 12 of the Revised Statutes of Missouri of 1899, two sections, called sections 1194a and 1194b, when the act of 1903 adopted sections so numbered as part of the same article and chapter; that there was by the act of 1905 no repeal or attempted repeal of said act of 1903; that the act of 1905 cannot be treated as amendatory to the act of 1903, because it was insufficient, for the reason that it did not, in anywise, comply with the provisions of section 34 of article IV of the Constitution of the State, which provided as follows:

> "No act shall be amended by providing that designated words thereof be stricken out, or that designated words be inserted, or that designated words be stricken out and others inserted in lieu thereof; but the words to be stricken out, or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, together with the act or section amended, shall be set forth in full, as amended."

And that the act was therefore invalid because the law is uncertain, there being two separate enactments upon two different subjects, designated as section 1194a and 1194b, of article IV of chapter 12 of the Revised Statutes of 1899 (p. 9).

(e) Because, while it provided that no individual company or corporation owning, operating, managing or leasing any

railroad, or part of railroad, should demand, charge or receive, for the carriage of the commodities mentioned, higher rates than those fixed in the act, it also provided that the penalty for a violation of the act should be enforced only against railroad companies, whereby individuals were exempted from such penalties; and that this was a discrimination between individuals and companies, and denied to the complainant the equal protection of the laws guaranteed to it by the Fourteenth Amendment to the Constitution of the United States (p. 10).

The bill further averred that the complainant was and for many years past had only been able to carry on its business in Missouri without bankruptcy because of its earnings from interstate business. That the rates charged by it for the transportation of property between points in Missouri were lawful, just and reasonable to the public, and had been in effect under the sanction of the Railroad Commissioners of the State; that the rates charged on all commodities transported between points in the State were not, nor had they been, for many years remunerative or afforded to the complainant a fair or reasonable return for its services upon the value of its property employed therein; that complainant's local business was carried on at an actual loss, and that if it complied with the requirements of the act, it would lose a further large sum; that the rates prescribed by the act, whether considered separately or as a whole in connection with the entire freight traffic in the State, were unjust, unreasonably low and confiscatory. That the classes of freight mentioned in the act could not be carried at the rates therein prescribed except at an actual loss. (Record, Vol. 1, pp. 10-11.)

Complaint was also made that the provision in the act, that in computing the distance upon which the maximum rates should be based, the whole distance over which a ship-

ment was to be transported in the State should be considered, although it might be over the roads of two or more companies, was invalid because it would operate to reduce the rates upon through shipments, making them more unreasonable than in the case of a shipment between points upon a single railroad. (Record, Vol. 1, p. 11.)

The bill further averred that there were many other companies operating lines of railroad in the State, each of which claimed that the rates fixed by the act of 1905 were confiscatory, and if charged, would result in the company doing its State business without any profit. And it was stated that each of the other companies had filed, or would at once file, a bill similar to that of the complainant. And it was averred that if it should be held that the rates fixed by the act were valid as against the complainant, but in point of fact were unreasonably low against each of the other companies, the act would be invalid as against the complainant, and therefore, in such case, even if held valid as to the complainant, would be unconstitutional because it would be discriminatory as not applying alike to all persons and corporations operating railroads in the State. (Record, Vol. 1, p. 12.)

The bill complained particularly of the rate fixed by the act for the transportation of live stock, averring that the cost of such transportation was greater than that of other commodities, while the act fixed a rate for its transportation much lower than that prescribed for salt, cement and certain other commodities. This, it was averred, worked an injustice between the shippers, producers and manufacturers of the State, and likewise operated to deprive the complainant of its property without due process of law, and denied to it the equal protection of the laws because the Legislature, having established maximum rates of charges for the transportation of all kinds of property, which were presumably

fair and reasonable, was now attempting to further regulate the affairs of the complainant and to require it to discriminate in favor of certain persons and shippers in giving them a rate less than the general rate theretofore fixed by law. (Record, Vol. 1, pp. 12-13.)

The prayer of the bill was (1) that the act of 1905 be declared unconstitutional, unenforcible and not binding upon the complainant; (2) that the defendants be enjoined from taking any steps looking to the enforcement of the provisions of the act. (Record, Vol. 1, p. 13.)

At the same time the seventeen other companies operating railroads in the State filed bills of complaint, all of a similar character.

RESTRAINING ORDER.

Immediately upon the filing of the bill, a restraining order was issued in this and each of the other cases, which was as follows:

> "The original bill of complaint having been this June 16, 1905, by the solicitors for complainant duly presented, and the court being fully advised in the premises, orders and decrees: Complainant's application for temporary injunction herein is set down for hearing at the United States Circuit Court room in Kansas City, Missouri, on June 26, 1905, at 10 o'clock a. m., or as soon thereafter as it is convenient for the court to hear the same.
>
> In the meantime, and until the further order of court herein, each and all of the above named defendant railroad commissioners, their agents, servants and successors, are restrained from taking any steps to put in force the maximum rates mentioned in the act of the legislature of the State of Missouri, approved April 15, 1905, and entitled

'An Act, entitled 'An act to amend chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled 'Corporations, private,' by repealing section 1194 of said Revised Statutes, being part of article IV of said chapter concerning railroad classification—charges—commissioners, and to enact in lieu thereof the following new sections providing for the regulation of freight charges by railroads and the recovery of penalties for the violation thereof;' from requiring complainant to post said maximum rates at any place, or to file same with them; from requiring a schedule thereof to be filed with them; from taking or making out, or printing, or delivering any schedule of rates for complainant containing the maximum rates fixed by said act; from instituting any investigation of any complaint that any rate is unreasonable, extortionate or unjust because higher than the maximum rate fixed by said act; from directing the attorney-general of the State, or any prosecuting attorney therein, to prosecute or assist in prosecuting complainant directly or indirectly for any failure to file a schedule adopting said maximum rates, or for any failure to recognize, adopt or comply with said act.

And in the meantime, and until the further order of court herein, the above named attorney-general and his assistants and successors are restrained from bringing any suit or action against complainant to enforce against it, directly or indirectly, any penalty in anywise dependent or based upon the failure of complainant to recognize or abide by the said act of the legislature.

And in the meantime, and until the further order of court herein, the defendants, John A. Knott, Joseph P. Rice, and Frank A. Wightman, Railroad Commissioners of the State of Missouri; Herbert S. Hadley, Attorney-General of the State of Missouri; Charles M. Daily, William F. Davis and James F. Robb, and all other shippers affected by this proceeding, are restrained from instituting any action, or taking any steps to collect any penalties for the alleged violation of said act of 1905.'' (Record Vol. 1, pp. 15-16.)

THE PRELIMINARY INJUNCTION.

On July 12, 1905, the causes came on for hearing upon the application of the complainants for a preliminary injunction, and after being fully argued upon the face of the bill, the objections thereto urged by the defendants being the same as subsequently formulated in their demurrers to the bill, the court ordered that the restraining order theretofore issued should continue and remain in force as a temporary injunction. (Record, Vol. 1, p. 19.)

THE DEMURRER TO THE BILL.

On August 7, 1905, the Attorney-General of the State, one of the defendants, filed his demurrer to the bill of complaint. At the same time the Railroad Commissioners also filed their demurrer.

Among other grounds upon which the demurrer proceeded was the fact that it did not appear from the bill of complaint that charges for the transportation, between points within this State, of such articles of freight, maximum rates for the transportation of which were not fixed by the act of 1905, might not or could not have been established by the complainant if it had chosen to make any effort to do so, or by the Board of Railroad Commissioners, if it had been permitted by the complainant to do so, at such rates as would have been reasonable and just, both to the complainant and to the public, observance of which and of the provisions of the act of 1905, in the transportation by complainant of its entire intrastate traffic, would, as a whole, have rendered to the complainant a fair and reasonable profit for transporting the same. That complainant had made no effort or attempt to readjust its schedules of freight rates, as a whole, with a view of complying with the requirements of the act of 1905, nor had it afforded to the Board of Railroad Commissioners

any opportunity on its part of making such effort, but, on the contrary, by filing the bill of complaint on the day said act took effect, and obtaining the restraining order before the Board of Railroad Commissioners could by any possibility have taken any action in the direction of establishing freight rate schedules for intrastate traffic, which, considered as a whole, would produce a reasonable compensation to the complainant for its services, had prevented said Board from making any such effort. (Record, pp. 21-23.)

DEMURRER TO BILL OVERRULED.

On October 14, 1905, the court overruled the demurrers to the bills of complaint. (Record, p. 27.)

ANSWERS TO THE BILL OF COMPLAINT.

On November 28, 1905, the Railroad Commissioners filed their answer, and on December 1, 1905, the Attorney-General filed his answer to the bill of complaint.

THE ANSWER.

The answer (Record, Vol. 1, pp. 28-37) denied the material allegations of the bill of complaint, and asserted the validity of the act of 1905. It averred that the complainant and the seventeen other companies operating lines of railroad in the State, acting in concert, did, upon the day the act took effect, file their bills of complaint to enjoin the officers of the State from taking any action or discharging any duties which might be imposed upon them by law in respect of said act and for the purpose of obtaining a decree adjudging the act to be null and void upon the grounds stated in the bills of complaint; that upon the filing of the bills a restraining order was at once issued and served upon the Attorney-General and the members of the Board of Railroad

and Warehouse Commissioners, enjoining them from performing any of the duties imposed upon them as State officials, by law, looking to the enforcement of the provisions of the act.

The answer further averred, in substance, that the filing of the bill was premature; that the rates for carrying a large number of articles, constituting a large part of the intrastate freight traffic of the complainant, remained wholly unaffected and unregulated by the act of 1905, or any other existing statute; that the question as to whether rates are compensatory or otherwise could only be determined upon a consideration of a schedule which should embrace every article and all the freight transported by the complainant in its State business; that no effort had been made by the complainant to revise its rates upon articles of freight not affected by the act; that by the issue of the restraining order the Board of Railroad Commissioners had been prevented from attempting to revise the schedule, to the end that the rates, as a whole, upon all the intrastate freight transported by the complainant might be compensatory.

That part of the answer was as follows:

> "These defendants say that they are informed and believe that the rates fixed by said Act of 1905 do not affect all the articles of freight transported by the complainant in its intrastate traffic, but that a very large number of articles, and a very large part of its intrastate traffic, remain wholly unaffected and unregulated, as to rates, by said act or by any other existing statute. And these defendants say that the question of whether rates are compensatory or otherwise, can only be determined upon a consideration of a schedule of rates, which shall embrace every article and all the freight transported by the complainant in carrying on its intrastate business.
>
> These defendants are informed and believe that the complainant, if it had chosen to do so, instead of attacking the reasonableness or fairness of the

rates upon the few articles mentioned in the Act of 1905, might have revised its schedule of tariff of rates upon all the articles of freight transported by it in carrying on its intrastate traffic, including those mentioned in said Act of 1905, in such a manner that the rates for carrying the articles not mentioned in said act would have been not unreasonable or unjust, either of (to?) itself or to the public, and that the income derived by the complainant for performing the service of transporting freight at the rates and charges fixed in such a schedule would have been sufficient to assure to the complainant a fair and reasonable return upon the fair value of its property necessarily employed in the carrying on of such intrastate business.

These defendants further aver that the complainant afforded to these defendants, as a Board of Railroad Commissioners, no opportunity, after said Act of 1905 took effect, to revise, adjust and fix a schedule of rates upon all the articles of freight transported by the complainant in its intrastate traffic, including those mentioned in said Act of 1905, in such a manner that the provisions of said Act of 1905 would be observed, and at the same time the rates upon all other articles not mentioned in this act, should be not unreasonable or unjust, either to the complainant or to the public.

These defendants further say that if the complainant had failed to so revise or to attempt to so revise its schedule, these defendants, as such board, would, if they had been given the opportunity which was denied to them by the injunction in this cause, in the discharge of the duties imposed on them by law, have attempted to fix and establish such a schedule of rates upon all the articles of freight transported by the complainant in its intrastate traffic as would have observed or complied with the provisions of said Act of 1905, and in other respects have been not unjust or unfair either to the complainant or to the public, and they believe that they could have done so.

These defendants further say that by the issue of the restraining order, and the preliminary injunction in this cause, they have been prevented

from fixing any such schedule or attempting to fix a schedule of rates which should be just to the complainant and to shippers; that the complainant, by the filing of its bill before these defendants, as such board, could lawfully act in the premises, has unwarrantably assumed that these defendants, as such board, would fix and establish a schedule of rates which would be unjust to the complainant.

These defendants say that in view of the statutes of this State, which define the duties to be discharged by them as such board, this action ought not to be maintained, because it was brought before these defendants had any opportunity to discharge any of such duties, or act in the matter of a general revision of the schedule of rates, made necessary by said Act of 1905."

(Record, Vol. 1, pp. 35-37.)

THE REFERENCE TO A MASTER.

On March 5, 1906, this and other cases were referred to a Master to take the evidence and report his findings of fact thereon. The order of reference provided that he should hear only such of the cases as the parties, by their counsel, should, at the beginning of the inquiry, agree should be heard. (Record, Vol. 1, pp. 56-7.)

PROCEEDINGS BEFORE THE MASTER.

Pursuant to this order, the Master proceeded, under an agreement of counsel, to take the evidence in three of the eighteen suits: in the one brought by the complainant, the one brought by the Wabash Railroad Company, and the one brought by the Missouri Pacific Railway Company. A very large amount of testimony was taken before the Master, sitting at St. Louis, at Chicago and at Kansas City, in each of the three cases.

The taking of the testimony before the Master was fully completed, and the *testimony closed* in the suit brought *by*

the complainant on April 17, 1907 (Record, Vol. I, pp, 1099, 1126); in the case of the Wabash Railroad Company, on April 16, 1907 (Record, Vol. 3, pp. 3058-9); and in the case of the Missouri Pacific Railroad Company, on April 17, 1907 (Record, Vol. 2, pp. 2159-60).

THE ACT REGARDING THE TRANSPORTATION OF STONE, SAND AND BRICKS.

The General Assembly had, by an act approved April 14, 1905, and which became effective June 16, 1905, also fixed maximum rates for the transportation of stone, sand and brick. This act had not been referred to in the original bill. It was as follows:

> "An Act to amend article IV, chapter 12, of the Revised Statutes of Missouri of 1899, entitled 'Railroad classification, charges, commissioners,' by adding a new section thereto, to be known as section 1135a.
>
> Be it enacted by the General Assembly of the State of Missouri, as follows:
>
> Section 1. That article IV, chapter 12, of the Revised Statutes of Missouri of 1899, entitled 'Railroad classification, charges, commissioners,' be and the same is hereby amended by adding a new section thereto, to be known as section 1135a, to read as follows:
>
> Section 1135a. No individual, company or corporation owning, operating, managing or leasing any railroad or part of a railroad in this State, shall charge for or receive for carrying a carload of forty thousand pounds of undressed stone, sand or building or paving bricks more than forty cents per ton for the first ten miles, twenty cents per ton for the second ten miles, or more than five cents per ton for each additional ten miles, and any excess in weight shall be charged for at the same rate per ton as for an even carload.
>
> Approved April 14, 1905."
>
> (Record Vol. 1, pp. 62-3, Missouri Session Acts, 1905, p. 104.)

THE FREIGHT RATE ACTS OF 1907.

The General Assembly of 1907 passed three acts regarding the transportation of freight. One of them, approved March 19, 1907, repealed the act of April 15, 1905, attacked by the original bill of complaint, and the act of April 14, 1905, concerning the carriage of stone, sand and brick, and enacted a new law instead of them. This new enactment took effect June 14, 1907. It fixed maximum rates for the transportation of certain commodities in carload lots, such rates being on the whole higher than those fixed by the act of 1905. Said act of March 19, 1907, was as follows:

"AN ACT to repeal an act of the 43rd general assembly, approved April 15, 1905, entitled 'An act to amend chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled 'Corporations, private,' by repealing section 1194 of said Revised Statutes, being part of article IV of said chapter, concerning railroad classification, charges, commissioners, and to enact in lieu thereof the following new sections providing for the regulation of freight charges by railroads and the recovery of penalties for the 43rd general assembly, approved April 14, 1905, entitled 'An act to amend article IV, chapter 12, of the Revised Statutes of Missouri, 1899, entitled 'Railroad classification, charges, commissioners,'' by adding a new section thereto, to be known as section 1195a, fixing the charges for carrying undressed stone, crushed rock and building or paving brick,' and to enact in lieu thereof certain new sections, to be known as sections 1194, 1194a-1, 1194b-1 and 1194c-1, providing for the regulation of freight charges by railroads and prescribing the punishment for a violation thereof, which new sections shall read as follows:

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. That sections 1194, 1194a and 1194b of an act of the 43rd general assembly, approved April 15, 1905, concerning railroad classifications, charges, commissioners, and providing for a penalty for a violation thereof, said sections being enacted in lieu of section 1194, chapter 12 of the Revised Statutes of Missouri, 1899, in 'Corporations, private,' and section 1195a of an act of the 43rd general assembly, approved April 14, 1905, concerning railroad classifications, charges, commissioners, fixing charges for carrying undressed stone, crushed rock and building or paving brick, be and the same are hereby repealed, and the following, to be known as sections 1194, 1194a-1, 1194b-1 and 1194c-1 of said Revised Statutes are enacted in lieu thereof.

Section 1194. No individual, company or corporation owning, operating, managing or leasing any railroad, or part of railroad, designated in section 1191 as in classes A, B or C, shall demand, charge or receive a greater or higher rate for carrying from initial to terminal points in this state articles named in the several classes and the commodities herein designated than is hereinafter provided for, namely: Class D, in car loads of 40,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first twenty-five miles, and not exceeding one-half cent per hundred pounds for the second twenty-five miles, or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class E, in car loads of 24,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first twenty-five miles, and not exceeding one-half cent per hundred pounds for the second twenty-five miles or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class F, in car loads of 30,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first twenty-five miles, and

not exceeding one-half cent per hundred pounds for the second twenty-five miles or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class G, in car loads of 30,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first twenty-five miles, and not exceeding one-half cent per hundred pounds for the second twenty-five miles or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class H, in car loads, in common cars, measuring inside from 29 feet to and including 30 feet and 6 inches in length (to be known as standard cars), not exceeding $8.00 per car load for the first twenty-five miles, and not exceeding $4.00 per car load for the second twenty-five miles or fractional part thereof, and not exceeding $2.00 per car load for each additional twenty-five miles or fractional part thereof of over twelve miles. For the carriage of any of the articles comprising class H, in cars of other lengths for the distances above specified, the following percentages of the foregoing rates per car load shall not be exceeded, namely: In cars of length less than 29 feet, 94 per cent.; in cars of length over 30½ feet to and including 32 feet, 104 per cent.; in cars of length over 32 feet to and including 33 feet and 9 inches, 107 per cent.; in cars of length over 33 feet and 9 inches to and including 36 feet, 110 per cent.; in cars of length over 36 feet to and including 38 feet, 113 per cent.; in cars of length over 38 feet to and including 40 feet, 116 per cent.; in cars of length over 40 feet to and including 42 feet, 125 per cent.; in cars of length over 42 feet to and including 44 feet, 135 per cent.; in cars of length over 44 feet, 140 per cent. of the rates herein specified for cars of the standard length of 29 feet to and including 30 feet and 6 inches shall not be exceeded. All the foregoing lengths to be taken by inside measurements. Class 1, in car loads of 20,000 pounds minimum weight, not exceeding $14.00 per car load for the first twenty-five miles, and not exceeding $2.00 per car

load for the second twenty-five miles or fractional part thereof, and not exceeding $2.00 per car load for each additional twenty-five miles or fractional part thereof. For a car load of 40,000 pounds of minimum weight undressed stone, crushed rock, sand, railroad ties, cordwood, building or paving brick, not exceeding 40 cents per ton of 2,000 pounds to the ton for the first fifty miles or fractional part thereof, and not exceeding five cents per ton per car load for the next ten miles or fractional part thereof, and not exceeding 5 cents per ton per car load for each additional ten miles or fractional part thereof. In computing the rate of freight, according to the provisions of this article, the distance shall be computed from the point where it is received to the point of destination in the state, notwithstanding it may pass from one road to another.

Section 1194a. Any individual, company or corporation owning, operating, managing or leasing any railroad, or part of railroad, designated in section 1194, or any officer, agent, representative or employe thereof who violate the provisions of section 1194 shall be adjudged guilty of a misdemeanor, and on conviction, shall be punished by a fine of not to exceed $5,000.00: Provided, that the money received from any fine under the provisions of this act shall be paid into the school fund in the county in which the case is prosecuted.

Section 1194b. This act shall not have the effect of relieving any person, partnership or corporation, owning or operating any railroad in this state from any liability or penalty heretofore incurred for failure to comply with any law of this state.

Section 1194c. All acts and parts of acts, and all rules and regulations, freight schedules, classifications and groupings by railroad companies, or the railroad and warehouse commissioners of this state, in conflict with the provisions of this act, are hereby repealed and declared void.

Approved March 19, 1907."

(Record Vol. 1, pp. 64-6, Missouri Session Acts, 1907, pp. 171-3.)

Another of the acts of the General Assembly of 1907 wa approved March 19, 1907, and also took effect June 14, 1907, and fixed maximum rates for the carriage of fruit in carload lots. That act was as follows:

"AN ACT to amend article 4, chapter 12, Revised Statutes of Missouri of 1899, by adding a new section thereto, to be known as section 1195a, and relating to freight charges and classifications.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. That article 4, chapter 12, of the Revised Statutes of Missouri, 1899, entitled 'Railroad classification, charges, commissioners,' be and the same is hereby amended by adding a new section thereto, to be known as section 1195a, which said section shall read as follows:

Section 1195a. No individual, company or corporation owning, operating, managing or leasing any railroad or part of railroad in this state, shall charge for or receive for carrying apples and pears in car loads of 24,000 pounds minimum weight more than six cents per hundred pounds for the first twenty-five miles or fractional part thereof, and not more than one cent per hundred pounds for each additional twenty-five miles or fractional part thereof. For strawberries, peaches, grapes and other berries in car loads of 18,000 pounds minimum weight, not exceeding fifteen cents per hundred pounds for the first twenty-five miles or fractional part thereof, and not exceeding two cents per hundred pounds for each additional twenty-five miles or fractional part thereof.

Sec. 2. All acts and parts of acts, and all rules and regulations, freight schedules, classifications and groupings by railroad companies, or the railroad and warehouse commissioners of this state, in conflict with the provisions of this act, are hereby repealed and declared void.

Sec. 3. Any individual, company or corporation owning, operating, managing or leasing any

railroad or part of a railroad in this state, violating the provisions of this act, shall, on conviction, be adjudged guilty of a misdemeanor, and subject to a fine not to exceed one thousand dollars for each offense.

Approved March 19, 1907."

(Record Vol. 1, pp. 66-7, Missouri Session Acts 1907, p. 187.)

Another act was approved April 4, 1907, took effect June 14, 1907, and provided for free transportation for shippers in certain cases. That act was as follows:

"AN ACT to provide transportation on railroads for the shippers of freight in this state in carload lots.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. Whenever any railroad company or corporation doing business within the limits of this state shall receive any live stock to be shipped over the said road or roads by carload lots, said corporation shall, in consideration of the price paid for said carload lots, issue to the shipper, his agent or employe, at the time of making out the contract or bill of lading, a round trip ticket to and from said points designated in said bill of lading, without further expense to said shipper, provided that the points of destination are within this state, and in case said point of destination is without this state, then said railroad corporation shall issue to such shipper, his agent or employe a round trip ticket to a point within this state nearest to the point without this state to which said shipment of live stock is shipped: Provided, that in case said shipper shall ship more than one car load at any one shipment the said railroad corporation shall not be compelled to give to said shipper more than one round trip ticket with such shipment, which said ticket shall be good on the freight train on which said stock is shipped, and on all trains on said road carrying passengers on the return trip, and shall be good for a period of ten days, and any railroad

company or corporation willfully violating the provisions of this section, or which shall fail, neglect or refuse to furnish and deliver such ticket to such shipper, his agent or employe, shall forfeit and pay, as a penalty, to said shipper, not less than three hundred dollars nor more than five hundred dollars, to be recovered by civil action in any court of competent jurisdiction.

Approved April 4, 1907."

(Record Vol. 1, pp. 67-8, Missouri Session Acts 1907, p. 176.)

THE PASSENGER RATE ACT OF 1907.

The General Assembly of 1907 also passed an act approved February 27, 1907, which also took effect June 14, 1907, fixing maximum rates for the transportation of passengers within the State. That act was as follows:

"AN ACT to repeal sections 1191 and 1192 of chapter 12, article 4, Revised Statutes of Missouri, 1899, entitled 'Railroad classification—charges —commissioners,' by striking out sections 1191 and 1192, and enacting the following new sections in lieu thereof, to be known as sections 1191 and 1192 and 1192a.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. That all of sections 1191 and 1192 of chapter 12, article 4 of the Revised Statutes of Missouri, 1899, be and the same are hereby repealed and three new sections be enacted in lieu thereof, to be known as sections 1191 and 1192 and 1192a, so that said sections shall read as follows:

Section 1191. Roads classified.—All railroads in the state of Missouri are hereby divided into four classes, to be known as class A, class B, class C and

class D. Class A shall include all through or trunk line railroads and all branch roads owned, leased, controlled or occupied by such through or trunk line railroad companies or corporations. Class B shall include all other railroads or parts of railroads owned, leased, controlled or occupied, or which may hereafter be owned, leased, controlled or occupied, either wholly or in part, by any trunk line company or corporation. Class C shall include all other railroads of a greater length than forty-five miles. Class D shall include all roads less than forty-five miles in length not owned, leased, controlled or occupied by any trunk line company or corporation.

Section 1192. Passenger charges regulated.—Any individual, company or corporation owning, operating, controlling or leasing any railroad or part of a railroad in this state, in the several classifications as herein prescribed, shall be limited to a compensation per mile, for the transportation of any person with ordinary baggage not exceeding one hundred pounds in weight, as follows: In classes A, B and C, not exceeding two cents per mile, and in class D, not exceeding four cents per mile: Provided, that no such individual, company or corporation shall charge, demand or receive any greater compensation per mile for the transportation of children of the age of twelve years or under than one-half of the rate above prescribed; and provided further, that the rates for transportation herein prescribed may be reduced, as hereinafter provided.

Section 1192a. Any individual, company or corporation, or any agent or officer thereof, who shall violate any of the provisions of section 1192 of this act, shall be deemed guilty of a misdemeanor, and upon conviction, shall pay a fine of not less than one hundred nor more than five hundred dollars.

Approved February 27, 1907."

(Record Vol. 1, pp. 69-70, Missouri Session Acts, 1907, pp. 170-1.)

APPLICATION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL BILL.

June 11, 1907, nearly two months after the taking of the testimony before the Master had been closed and the cases were awaiting argument before the Master, and three days before the freight rate acts and the passenger rate act of 1907 took effect; the complainant filed its motion for leave to file an amended and supplemental bill (Record, Vol. 1, pp. 57-8.)

This motion was opposed by the defendants upon the grounds thereafter fully set out in their demurrer to the amended and supplemental bill, and was submitted upon oral argument June 15, 1907. (Record, Vol. 1, p. 60.)

ORDER GRANTING LEAVE TO FILE AMENDED AND SUPPLEMENTAL BILL.

June 17, 1907, complainants' motion for leave to file an amended and supplemental bill was sustained (Record, Vol. 1, pp. 60-1), and an order made giving leave to file the same as of June 11, and it was filed. (Record, Vol. 1, p. 61.)

This order also granted a temporary injunction as to the freight rate laws of 1907. (Record, p. 61.) The order also provided as to the passenger rate act of 1907 that the rates fixed thereby should be put in force for three months. (Record, Vol. 1, p. 61.)

July 16, 1907, an "Amendment to complainants' bill of complaint" was filed. (Record, Vol. 1, p. 75.)

THE AMENDED AND SUPPLEMENTAL BILL AND THE AMENDMENT THERETO.

The amended and supplemental bill (Record, Vol. 1, p. 62) and the amendment thereto (Record, Vol. 1, p. 75), set out the enactment of the three freight rate laws and the passenger rate law of 1907. It averred that each of the freight rate laws violated the provisions of the Constitution to the same extent as was alleged of the act of 1905 (Record, Vol. 1, p. 68); that the rates fixed by the freight rate acts of 1907 were unreasonable and less than the cost of service; that although the maximum freight rates provided by the act of 1907 had been increased, they were still unreasonable, and did not afford fair compensation to the complainant. (Record, Vol. 1, p. 68.)

It was also averred that the passenger act of 1907 was unconstitutional and void for the same reasons urged in the original bill against the freight rate act of 1905; that the value of that portion of the complainant's property devoted to the carriage of State business, considered as a whole or separately as to the passenger business only, was such that in either case the reduction in rates by the passenger act would cause the business to be done at an actual loss. (Record, Vol. 1, p. 70.)

It was further averred (Record, Vol. 1, p. 72) that the rates fixed by each of the freight rate acts of 1907 and by the passenger act of the same year, and as a whole, are so unreasonable and confiscatory that a compliance therewith would force a confiscation of the complainant's entire revenue contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States. (Record, Vol. 1, p. 72.)

It was further averred that to enforce the rates fixed in any of said acts would necessarily affect the interstate rates

upon the same commodities; and because Congress had attempted to legislate upon the subject of interstate rates, and because none of the rates fixed by the said acts complained of could be enforced without affecting interstate rates, all of said acts were unconstitutional and void and violative of section 8, article I of the Constitution of the United States. (Record, Vol. 1, p. 72.)

The prayer was that each of the acts of 1907, including the passenger rate act, be declared unconstitutional, and that all the relief asked in the original bill, as to the act of 1905, be granted as to the acts of 1907, and that the temporary injunction granted against the defendants on the original bill might be extended so as to cover any proceedings by them under any of the acts of 1907.

The amendment to complainant's bill of complaint complained that the penalties provided by the State laws were harsh and unreasonable (Record, Vol. 1, p. 79), and that the acts complained of directly influenced, affected and bore upon interstate passenger traffic and fixed and regulated the same. (Record, Vol. 1, pp. 78-80.)

THE DEMURRER TO THE AMENDED AND SUPPLEMENTAL BILL OF COMPLAINT AS AMENDED.

August 2, 1907, the defendants demurred to the amended and supplemental bill of complaint as amended. The demurrer formulated the grounds upon which, at the oral argument in June, the motion for leave to file an amended and supplemental bill had been opposed by the defendants.

Beside the general grounds of demurrer, it proceeded upon the grounds (1) that the matters and things set forth in the amended and supplemental bill of complaint as amend-

ed were not, nor were any of them, germane to or supplementary of the original bill in the case; and, (2) that if the complainant was entitled to any relief whatever on account of facts stated in the amended and supplemental bill of complaint, such facts constituted a new, original and independent cause of action not connected with or dependent upon the cause of action set forth in the original bill. (Record, Vol. 1, pp. 83-4.)

INTERLOCUTORY REPORT OF THE MASTER.

September 24, 1907, the Special Master filed his interlocutory report, stating that the evidence had been taken in three cases, and that June 18, 1907, had been fixed as the day for the argument thereon before the Master; but that the complainants, having just prior to that date filed amended and supplemental bills, further proceedings before the Master were, by consent of parties, suspended, and the Master prayed for further directions. (Record, Vol. 1, pp. 93-4.)

Upon this report the court made an order that all the matters involved in the original bills and the amendments should be fully heard and the findings embraced in a single report. (Record, Vol. 1, p. 94.)

OVERRULING THE DEMURRER TO AMENDED AND SUPPLEMENTAL BILL.

April 10, 1908, the demurrers to the amended and supplemental bill of complaint as amended were overruled. (Record, Vol. 1, p. 95.)

THE ANSWER TO THE AMENDED AND SUPPLEMENTAL BILL OF COMPLAINT AS AMENDED.

May 12, 1908, the defendants filed their answer to the supplemental bill and the amendment thereto. The answer admitted the enactment of the laws of 1907, both freight and passenger, as set out in the amended bill.

It denied that any of the freight acts were violative of the provisions of the Constitution, or that the rates fixed by them were unreasonable or confiscatory. It denied the existence of the purposes and motives of the Legislature of the State, as attributed to them by the amended and supplemental bill. (Record, Vol. 1, p. 96.)

It denied that the act regulating passenger rates was violative in any respect of any provision of the Constitution of the State or of the United States, or that the act would reduce the earnings of the complainant from its passenger business in any amount whatever. It disclaimed any knowledge, information or belief as to the amount of State passenger earnings for the year 1906, and denied that if the passenger act had been applied thereto, the State earnings would have been reduced in any amount whatever.

It denied that the reduction in rates by the passenger act would fail to make a reasonable return on the valuation of that portion of complainant's property devoted to the carriage of State business considered as a whole or separately as to passenger business only, and denied that such reduction would cause such business to be done at a loss. It denied that the passenger act was passed for the avowed purpose of reducing the passenger rates, so as to offset the increase of freight rates made by the act of 1907. (Record, Vol. 1, p. 97.)

The answer denied that to enforce the rates fixed by any of the acts of 1907 would necessarily affect interstate rates on the same commodities; and it averred that for many years the complainant had voluntarily carried passengers in the State, whose travel was wholly within the State, at the rate of two cents a mile, and that it had carried many persons without exacting any compensation whatever, and that the great bulk of passenger transportation within the State had been for many years conducted at approximately two cents a mile; and that the charge of three cents exacted by com-

plainant or any persons was an unjust, excessive and discriminatory charge upon such persons. (Record, Vol. 1, p. 96.)

The answer further averred in substance that the matters and things alleged in the amended and supplemental bill were not proper subjects of inquiry in this suit, and that any controversy as to the validity of the acts of 1907 could not be determined in this action.

That averment was as follows:

> "Referring to subdivision (b) of paragraph III of complainant's amended and supplemental bill, this defendant says that the real purpose of the original bill herein was to determine whether that portion of the property of complainant devoted to State freight business could, if the Act of 1905 were enforced, receive such return upon its value as would be fair, reasonable and not confiscatory, and that upon the trial of the three cases heard by the special master such was the theory adopted by both parties, and the proofs were by both of them directed to that end. And this defendant avers that the only legitimate and proper inquiry in this suit is as to the questions of law and fact arising upon the issues made by the original bill and the answer thereto, as to the validity of the said Act of 1905, and the results of its operation, and whether the same, if enforced, would be confiscatory and unremunerative to the complainant. Defendant asserts that the purpose of the original bill ought not to be, and cannot, without disregard of the established rule of procedure of the court of chancery, be changed and perverted, to the end that the effect of the freight rate act, or the passenger rate Act of 1907, shall be [illegible] heard in this litigation, and that the only question proper to be considered or determined by this court in this action is the consequences to the complainant of the enforcement of the said Act of 1905."
>
> (Record, Vol. 1, p. 98.)

The answer further denied that any of the acts of 1907, if enforced, would deprive complainant of its property with-

out due process of law, or that they denied to the complainant the equal protection of the law; but it averred that each of said acts was a reasonable and proper regulation of rates, and that they prescribed fair, proper and remunerative rates for the service. It denied that any of the acts influenced, affected or bore upon interstate freight or passenger traffic, or that they fixed or regulated interstate freight or passenger traffic. (Record, Vol. 1, p. 101.)

ORDER FIXING DATE FOR FINAL HEARING.

No testimony was taken before the Master after the filing of the amended and supplemental bill. But on January 13, 1908, the court made an order: (1) that the Special Master should file in court all of the testimony taken before him; (2) the final hearing of the cause was fixed for October 5, 1908, upon the testimony already taken, and upon such further oral and documentary testimony as might be offered in open court at the hearing. (Record, Vol. 1, p. 114.)

Afterward the date for final hearing was postponed to November 9, 1908. (Record, Vol. 1, p. 117.)

The hearing was continued from day to day, much oral and documentary evidence being produced, until December 30, 1908, when it was concluded. (Record, Vol. 1, p. 167.)

This case and the other seventeen cases were each submitted to the court *upon all the evidence taken before the Master and in open court;* the testimony taken *in each of the cases* being regarded as *having been offered in each and every one of the other cases.* (Record, Vol. 1, pp. 169-171.)

THE FINAL DECREE.

March 8, 1909, the cause having theretofore been argued and taken under advisement, the court rendered its final decree. (Record, Vol. 5, pp. 5241-3.)

Motions were afterwards filed by the complainant to amend the decree. (Record, Vol. 5, pp. 5244-6.)

THE AMENDED FINAL DECREE.

April 17, 1909, the court amended the decree, and adjudged and decreed:

1. That the maximum freight rate laws of Missouri of 1905 and 1907, and the passenger rate law of 1907, were unreasonable and confiscatory, and did not afford the complainant any fair or reasonable return upon the value of its property, and to comply therewith would take its property without due process of law.

2. The Attorney-General and the Railroad Commissioners were enjoined from enforcing, or attempting, directly or indirectly, by suit or otherwise, to enforce against the complainant, its officers or agents, any of the provisions of or the penalties provided for in said freight rate laws or in said passenger rate law.

3. The costs were equally divided; one-half to be paid by the complainant and one-half by the defendants. (Record, Vol. 5, pp. 5246-9.)

THE FINDING OF FACTS.

The court, upon entering its original decree, filed an opinion (Record, Vol. 5, pp. 5285-5304). It also made certain findings of fact. (Record, Vol. 5, pp. 5305-5327.)

THE QUESTIONS INVOLVED IN THIS APPEAL.

The complainant contended:

First: That the rates fixed for the transportation of freight by the maximum freight rate laws of 1905 and 1907 were so low that if it complied with them its compensation for the service of transportation would be insufficient to pay the operating expenses incident to that service and afford a fair and reasonable return upon the value of that part of its property employed in the service

Second: That the passenger rate law of 1907 fixed the maximum rate at so low a figure that complying with it the compensation of the complainant for the carriage of passengers would be insufficient to meet the operating expenses incident to that service and provide a fair and reasonable return upon the value of that part of complainant's property employed in the service.

Third: That any reduction of interstate rates for the transportation of either freight or passengers, operated to reduce interstate rates for the same class of service, and that this fact should be considered in the determination of the validity of any law making such reduction.

Fourth: That if any one of the laws in question was invalid as to one of the eighteen railroad corporations who instituted suits, it was invalid as to all of them.

Fifth: That the expenses of doing intrastate business, whether freight or passenger, should be ascertained *upon a revenue basis;* that is to say, that the gross revenue realized from either class of business should be taken as the basis from which the expense of doing that class of business was to be ascertained.

Sixth: That the acts of the General Assembly of Missouri were void, because the penalties provided by them were enormous, unreasonable and severe.

Seventh: That the maximum freight rate act of April 15, 1905, was void, because it provided that the rates fixed thereby were to be charged by any individual or railway company owning, operating, managing or leasing a railroad, while the penalties provided thereby for the violation thereof applied only to railroad corporations.

Eighth: That the complainant was entitled to a return upon the value of its franchise.

The defendants disputed each of these contentions.

IN ADDITION, THE DEFENDANTS CONTENDED:

First: That the action was prematurely brought; that the commencement of the suit on the day the maximum freight rate act of 1905 took effect, and the restraining order issued on that day and ever since continued in force, prevented the Board of Railroad Commissioners from making any effort to exercise their powers in revising rates for the transportation of a large quantity of freight not within the purview of said act, which revision might, for anything that appears in this case, have resulted in a schedule of lawful rates which, in connection with the rates prescribed by the act of 1905, would have afforded to the complainant a compensation for the service of transportation adequate to meet the expenses incident to such transportation, and afford to it a fair re-

turn upon the value of the property employed in that service.

Second: That the court should not have permitted the amended and supplemental bill of complaint and the amendment thereto to be filed, because said amended and supplemental bill and the amendment thereto dealt with matters not germane to the original suit; that is to say, the freight rate acts of 1907 and the passenger rate acts of 1907, and that therefore the court had no jurisdiction to declare any of said acts unconstitutional or void for any reason whatever.

THE APPEALS.

The defendants, John A. Knott, H. R. Oglesby and Frank A. Wightman, members of the Board of Railroad Commissioners, and Elliott W. Major, the Attorney-General, obtaining an order of severance from their co-defendants, were, on July 28, 1909, allowed an appeal from the decree. (Record, Vol. 5, pp. 5266-8.)

With their petition for an appeal they also filed an assignment of errors. (Record, Vol. 5, pp. 5257-64.)

The complainant was also allowed a cross-appeal, September 18, 1909, and filed its assignment of errors at the time, its complaint being that the court had adjudged against the complainant one-half the costs. (Record, Vol. 5, pp. 5333-6.)

A mass of testimony to support the contention of the opposing parties was taken and appears in the record, but as

much of it will necessarily be quoted and referred to more profitably in the printed argument to follow this abstract of the case, a statement of it at this point would cause useless repetition.

SPECIFICATION OF ERRORS.

The appellants specify the errors complained of by them as follows:

> "1. The court erred in adjudging and decreeing, by its amended decree, that the maximum freight rate laws of Missouri of 1905 and 1907 are unreasonable and confiscatory and do not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the property of complainant without due process of law; because the evidence shows that said laws are reasonable and compensatory, and that they do afford the complainant a fair and reasonable return upon the value of its property; and upon the evidence in the case, the complainant's bill and its amended and supplemental bill, in so far as they sought for any relief against, or brought into question the validity of said maximum freight rate laws, should have been dismissed.
>
> 2.. The court erred in its amended decree in thereby adjudging and decreeing that the defendant, Elliott W. Major, Attorney-General of the State of Missouri, be enjoined from enforcing or attempting, directly or indirectly, by suit or in any other manner whatsoever, to enforce against the complainant, its officers, agents, employes or servants, any of the provisions of or penalties provided for in the acts of the Legislature of the State of Missouri, mentioned in said decree, and approved, respectively, April 14, 1905, April 15, 1905, and two approved March 19, 1907.
>
> 3. The court erred in its amended decree in thereby adjudging and decreeing that the defendants, John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad Commissioners of the State of Missouri, be enjoined from enforcing, or attempt-

ing, directly or indirectly, by suit or in any other manner whatsoever, to enforce against the complainant, its officers, agents, employes or servants, any of the provisions of or penalties provided for in the acts of the Legislature of the State of Missouri, mentioned in said decree, and approved, respectively, April 14, 1905, April 15, 1905, and two approved March 19, 1907.

4. The court erred in decreeing that the maximum freight rate laws of 1905 and 1907 are unreasonable and confiscatory, do not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the property of complainant without due process of law; because the evidence in the case is not sufficient to overcome the presumption in favor of the validity of those laws, and the evidence does not establish clearly and beyond all doubt their invalidity.

5. The court erred in decreeing that the freight rate laws of 1905 and 1907 were confiscatory and therefore deprived the complainant of its property without due process of law, because the burden of proof upon that issue was upon the complainant, and that burden was not sustained. The exact gross revenue from intrastate business for any given period was easy of ascertainment. The ascertainment of the expense of earning that revenue was difficult by reason of the fact that interstate and intrastate freight were transported in the same trains and often in the same cars. It was in the power of the complainant, at any time during the litigation, to have determined, by actual observation and investigation for a period which should be typical, the volume of freight, both interstate and interstate, carried on each of its trains within the State of Missouri during such period, the revenue from each class of freight, and also, quite closely, the expense of moving each of said trains within the State, and to have exhibited to the court the result of such observation and investigation. The court would thus have been enabled to determine approximately how much of the total expense of moving said trains should be assigned to the intra-

state and interstate freight, respectively, contained in them.

No evidence of this character was adduced, no tests of this kind made. Upon this question the court was left to reach a conclusion upon the opinions of witnesses. No decree should have been rendered for complainant until this evidence of actual facts of vital importance, which was at its command, had been adduced to the court.

6. The court erred in adjudging and decreeing in its amended final decree herein that the maximum freight rate laws of Missouri, of 1905 and 1907, were unreasonable and confiscatory, and did not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the property of complainant without due process of law; and that none of the provisions thereof should or can be rightfully enforced against the complainant, its officers, agents or employes:

Because it appears from the evidence that a very large part of the intrastate freight transported by the complainant is not governed as to the rates to be charged therefor by the Acts of 1905 and the Acts of 1907, but that the maximum rates for the transportation thereof are fixed by the State Board of Railroad and Warehouse Commissioners, by authority of law, conferring upon them that power. It further appears from the evidence, that the complainant has not been charging for the transportation of such freight the rates so fixed by the State Board of Railroad and Warehouse Commissioners, but rates less than those so fixed. But the complainant failed to show and made no effort to show what its revenue from the intrastate freight business would have been had it charged the rates allowed by the State Board of Railroad and Warehouse Commissioners for such portion of the freight carried by it as was not governed by the Acts of 1905 and 1907; and therefore there is no evidence in the case that if the complainant had charged such rates, and had also complied with the Acts of 1905 and 1907, it would not have received a revenue from its intrastate freight business which would have afforded it

a fair, adequate and just return for doing such business. If it had charged what it might, according to the law of the State, have charged for the transportation of such freight, its receipts for doing its entire intrastate freight business might, for any evidence which appears in the case, have been sufficient to afford it all the net profit to which it was entitled.

7. The court erred in adjudging and decreeing in the amended final decree that the maximum freight rate laws of Missouri of 1905 and 1907 are unreasonable and confiscatory, and do not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the property of complainant without due process of law, because the said Acts of 1905 took effect on the 16th day of June, 1905, and the original bill herein, alleging the unconstitutionality of said Acts of 1905, and seeking to enjoin their enforcement was filed by the complainant on said 16th day of June, 1905, and on the same day a restraining order was issued herein, enjoining the defendants, the Railroad and Warehouse Commissioners, "from taking or making out or printing or delivering any schedule of rates for complainant, containing the maximum rates fixed by said acts." And on the 12th day of July, 1905, the court continued said restraining order as a temporary injunction, which was in force as against said defendants from said date until the final decree was entered. Therefore, at the time of the filing of said bill and the issue of said restraining order, the defendants, said Railroad and Warehouse Commissioners, because the law had not yet taken effect, had enjoyed no opportunity to revise the then existing schedule of rates.

The said defendants, Railroad and Warehouse Commissioners, had authority, under the law, to fix maximum rates for the transportation of that portion of the intrastate freight for which rates were not fixed by the Acts of 1905, which said portion was very large in volume and produced to the complainant much the larger part of its entire revenue for the transportation of intrastate freight. The

said Railroad and Warehouse Commissioners might, if they had not been prevented by the restraining order and temporary injunction herein, have fixed such rates for the transportation of said portion of such intrastate freight, and made schedules therefor, which schedules should also have embraced the maximum rates for the commodities mentioned in the said Acts of 1905, as would have permitted the complainant, while observing said schedules and said Acts of 1905, to have derived from its intrastate freight business, as a whole, a gross revenue sufficient to have yielded to it a fair, just and adequate net return or profit from the doing of its said intrastate freight business. The complainant should have deferred the institution of this suit until the said Board of Railroad and Warehouse Commissioners had fixed rates and adopted schedules so low as to disable the complainant from realizing an adequate revenue upon its entire intrastate freight business.

Therefore, the action was prematurely brought; and for this reason no restraining order or temporary injunction or final decree should have been rendered as to either of said maximum freight rate acts.

8. The court erred in adjudging and decreeing by its amended final decree that the passenger rate law of 1907, approved February 27, 1907, is unreasonable and confiscatory, and does not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the property of complainant without due process of law; because, upon the evidence in the case, said passenger rate law is reasonable and compensatory, and does afford the complainant a fair and reascnable return upon the value of its property; and upon the evidence in the case, the complainant's bill, and its amended and supplemental bills, in so far as they sought for any relief against or brought into question the validity of said passenger rate law of 1907, should have been dismissed.

9. The court erred in decreeing that the passenger rate law of 1907 is unreasonable and confis-

catory, does not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the property of complainant without due process of law; because the evidence in the case is not sufficient to overcome the presumption in favor of the validity of the law, and the evidence does not establish clearly and beyond all doubt its invalidity.

10. The court erred in its amended decree in thereby adjudging and decreeing that the defendant, Elliott W. Major, Attorney-General of the State of Missouri, be enjoined from enforcing or attempting, directly or indirectly, by suit or in any other manner whatsoever, to enforce against the complainant, its officers, agents, employes or servants, any of the provisions of or penalties provided for in said Act of the Legislature of the State of Missouri, mentioned in said decree and approved February 27, 1907.

11. The court erred in its amended decree in thereby adjudging and decreeing that the defendants, John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad Commissioners of the State of Missouri, be enjoined from enforcing, or attempting, directly or indirectly, by suit or in any other manner whatsoever, to enforce against the complainant, its officers, agents, employes or servants, any of the provisions of or penalties provided for in said Act of the Legislature of the State of Missouri, mentioned in said decree and approved February 27, 1907.

12. The defendants, John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad and Warehouse Commissioners, for themselves assert that the court erred in that part of its decree whereby it enjoined them from enforcing, or attempting, directly or indirectly, to enforce against the complainants, its officers agents, employes or servants, any of the provisions of or the penalties provided for in the passenger rate act, approved February 27, 1907; because, under the laws of the State of Missouri, they have no functions of any kind to perform in relation to rates for the carriage of passengers, nor do such laws vest in them any

authority, or devolve upon them any duties to be performed by them, directly or indirectly, to require or compel obedience to any laws relating to rates for the carriage of passengers.

13. The court erred in permitting the complainant, against the objection of the defendants, to file herein its alleged amended and supplemental bill of complainant, and the amendment thereto, because the original bill was based upon the Acts of the 43rd General Assembly of the State of Missouri, approved April 14, 1905, and April 15, 1905, which fixed maximum rates for intrastate freight, and the alleged amended and supplemental bill and the amendment thereto is based upon the Acts of the 44th General Assembly of the State of Missouri, approved March 19, 1907, which repealed said Acts of 1905 and established a new maximum of rates for intrastate freight, and the Act of the 44th General Assembly of the State of Missouri, approved March 19, 1907, fixing rates for the transportation of fruit, and the Act of the 44th General Assembly of the State of Missouri, approved February 27, 1907, fixing a maximum schedule of rates for passenger traffic, and the matters set forth in the said alleged amended and supplemental bill of complaint, and the amendment thereto, are not germane to or supplemental of the original bill of complaint herein.

14. The court erred in permitting the complainant, against the objection of defendants, to file the alleged amended and supplemental bill of complaint and the amendment thereto, so far as the same relates to the Act of the 44th General Assembly of the State of Missouri, approved February 27, 1907, fixing a maximum schedule of passenger rates, because the matters set forth in said alleged amended and supplemental bill, and the amendment thereto, relative to said Act of the 44th General Assembly of the State of Missouri, fixing a maximum schedule of passenger rates, are not germane to or supplemental of any of the matters alleged in the original bill.

15. The court erred in overruling the demurrer of the defendants to the alleged amended and

supplemental bill of complaint and the amendment thereto, because the matters contained in said alleged amended and supplemental bill of complaint and the amendment thereto are not germane to or supplemental of the original bill, and if they constitute any cause of action whatever, constitute a new, original and independent cause of action not connected with or dependent upon the original cause of action, and one that accrued, if at all, long after the original bill was filed.

16. The court erred in overruling the demurrer of defendants to the portions and paragraphs of the alleged amended and supplemental bill of complaint and the amendments thereto, relative to the Act of the 44th General Assembly of the State of Missouri, fixing a maximum schedule of passenger rates, because such portions and paragraphs of the alleged amended and supplemental bill of complaint, and the amendment thereto, are not germane to or supplemental of the original bill of complaint, and constitute, if anything, a new and independent cause of action not connected with or dependent upon the original cause of action, and one that accrued, if at all, long after the original bill was filed.

17. The court erred in granting to the complainant the relief asked, with respect to the Act of the 44th General Assembly of the State of Missouri, fixing a maximum schedule of passenger rates, because it was not authorized to take jurisdiction of that matter upon a bill of complaint filed as an amendment or supplement of a bill based upon acts of the 43rd General Assembly of the State of Missouri, which were confined to freight rates and had been repealed.

18. The court erred in enjoining the defendant, Elliott W. Major, Attorney-General of the State of Missouri, from prosecuting the suits for injunctive relief, instituted by his predecessor in office, Herbert S. Hadley, in the State court of Missouri, against the complainant prior to the filing of the alleged amended and supplemental bill of complaint herein.

19.. The court erred in finding that the ex-

pense of doing the intrastate business over the interstate is greater for carrying freight by at least fifty per cent. By this language in the finding is meant at least fifty per cent. more in proportion to revenue, while upon the weight of credible evidence in the case, the expense of doing the intrastate freight business over the interstate is not greater than thirty per cent. per ton per mile.

20. The court erred in finding that the evidence shows that the cost of doing the intrastate freight business, as between intrastate and interstate, apportioned upon the revenue basis with added extra cost, brings a result which is fair, representative or just.

21. The court erred in finding that, aside from the revenue basis, the evidence shows that the amount ascertained by the court in any of the cases, as the expense and extra cost of doing the intrastate freight business, is fair or justly represents the expense of doing the intrastate freight business.

The appellants assert, on the contrary, that aside from the revenue basis, there is no evidence in the case from which the result as found by the court as to the expense of doing the intrastate freight business can be reached.

22. The court erred in finding that the proper method of dividing the total expense of doing complainant's freight business in the State and assigning the proper proportion thereof to the intrastate freight business was by the application of the revenue theory and in accordance with that theory dividing the total expense between the two classes of business in proportion to the revenue derived from each, and then, to the portion thus assigned to the intrastate freight business, adding such an amount as would represent fifty per cent. greater expense in proportion to revenue for the intrastate than for the interstate business. The consequence was to burden the intrastate freight business with a portion of the total expense very largely in excess of its just proportion and a much greater share thereof than was actually incurred in doing that business.

The court should have found that the proper method of ascertaining that part of the total State freight expense justly assignable to the intrastate freight was by determining, as closely as possible, the average cost per ton mile of handling and transporting intrastate and interstate freight, respectively. The average cost per ton per mile deducted from the average revenue per ton per mile (which is easily ascertainable from the evidence) would have produced the net revenue per ton per mile derived from each class of freight. The court erred in its finding which rejected this method by the application of which the evidence in the case shows that complainant might have complied with the freight rate Acts of 1905 and 1907, and would still have derived from the doing of its intrastate business an adequate profit fully equivalent to any net return to which it is by law entitled.

23. The court erred in finding that the sum total of the extra cost of doing the intrastate freight business would not be changed if ascertained according to the ton mile theory.

On the contrary, the evidence shows clearly that if the expense of doing the intrastate freight business be ascertained by the appplication of the ton mile theory, that expense would be found to be very much less than the amount found by the court; so much less as to leave to the complainant a reasonable net return for doing the business.

24.. The court erred in finding that the revenue basis is the proper method of ascertaining the expense of the intrastate passenger traffic. In adopting that method the court divided the total expense of the passenger business done in the State between the intrastate and the interstate business, by assigning to each class such a proportion of such total expense as the revenue from each class of business bore to the total revenue from the State passenger traffic, and then adding to the proportion thus ascertained for the intrastate such an amount as would represent twenty-five per cent. greater expense in proportion to revenue for the intrastate than for the interstate business. The result of the application of this method was to charge the intra-

state business with a much larger share of the total expense than was actually incurred in doing that business.

The true method is to ascertain the average revenue and expense of carrying a passenger one mile, in each class of business, and the difference would be the net revenue or deficit on each passenger mile.

The evidence shows that the net revenue per passenger mile is greater in the intrastate than in the interstate business, and that the net revenue from its intrastate passenger business, if charged for at the rates fixed by the Act of February 27, 1907, affords to the complainant a reasonable and adequate return for doing the business.

25. The court erred in finding that the expense of doing the State passenger business over the interstate is at least twenty-five per cent.; this language meaning twenty-five per cent. more in proportion to revenue. The evidence in the case does not support this finding.

26. The court erred in adopting the tables of earnings and expenses of the complainant set forth in the finding of facts, because the said tables of expenses and of earnings did not cover any fairly representative period of operations of the complainant, and because said tables of expenses and earnings are not supported by any competent evidence in the case.

27. The court erred in finding that the short line between two competitive points necessarily fixes the rate. If the rate is thus fixed, it is because the complainant and the other railroad companies of the State have agreed with each other that it shall be so fixed.

28. The court erred in finding that it was conceded by the experts that the companies accurately and honestly kept their books, showing the facts set out in the findings of the court. The books of the companies did not show the facts set out in said findings, nor did the experts for the State concede that they did.

29. The court erred in finding (as stated in the opinion) that evidence in the case tended to

show that a large number of men have been discharged from the service of the railroad companies by reason of the reduction of the rates. Not a reduction in rates, but a general depression in business and the want of business to keep the men employed was the cause of their discharge.

30. The court erred in finding that the value of the complainant's franchise, included in the total valuation of its property as fixed by the State Board of Equalization, was so small a per cent. of such total valuation as to make no appreciable difference in the result of the case.

On the contrary, the evidence shows that the value of the franchise was a substantial part of such total valuation.

31. The court erred in finding that if the value of complainant's franchise were altogether omitted from the value of its property, it could not have obtained from the operation of its property, or from the doing of the intrastate freight business, the return to which it is entitled.

32. The court erred in finding that the complainant was entitled to a return upon the value of its franchise.''

PART I.

FREIGHT RATES.

BRIEF AND ARGUMENT.

I.

THE ESTIMATES BY COMPLAINANT'S WITNESSES OF THE EXPENSE OF DOING THE INTRASTATE FREIGHT BUSINESS AND THE FINDINGS OF THE CIRCUIT COURT UPON THAT QUESTION ARE GROSSLY EXAGGERATED.

A.

It will be convenient, and indeed it is necessary, to deal with the validity of the maximum freight rate laws attacked separately from that of the passenger rate law.

The bill of complaint was framed and the final decree was based upon the theory that the freight rate laws were unconstitutional and void because they deprived the complainant of its property without due process of law, in this, that the rates allowed by them were confiscatory and would not permit the complainant to earn a fair return upon the value of its property employed in the service of transportation.

The issue thus tendered was principally one of fact, and very much the larger part of the testimony contained in the five printed volumes of the record bore directly upon that question, and was offered in support of the opposing contentions upon that point. It is the principal question of fact in the case.

At this point it is proper to state the view of the defendants (the State officers) upon this important question of fact.

The burden is not upon the defendants to establish that the rates are compensatory. The burden is upon the complainant to show beyond doubt that they are not compensatory. In the effort to sustain this burden, the complainant has introduced a mass of evidence whose purpose is to prove that the expense of doing the State freight business is so much greater than that of handling the interstate traffic, that upon a proper apportionment of the total expense of both, so large a part of that total expense would be charged to the State business that it would be seen to be not only noncompensatory, but that the expense of it would so far exceed the gross revenue derived from it as to leave a startling deficit.

The revenues of the complainant in Missouri, according to the statement submitted by the complainant, are derived from three general sources: (1) the transportation of freight; (2) the carriage of passengers; (3) the transportation of mail, express, etc. A part of the revenue from each of these sources is derived from intrastate business—that is, business originating and ending within the State; and a part of it is derived from interstate business—that is, business either originating or terminating within the State, or business originating in one State and passing through Missouri into still another State.

The gross revenues of the company in Missouri from intrastate business are easily and accurately ascertained by an examination of the way bills. (Sturgis' testimony, Record, Vol. 1, pp. 232,249.)

The gross earnings of the company in Missouri from interstate business are ascertained upon a mileage basis. For example: If a shipment from Chicago, in the state of Illi-

nois, to Kansas City, in the State of Missouri, produced a gross revenue of $50, and the total mileage over which the shipment passed in course of transit was 500 miles, 250 miles of which were in Illinois and 250 miles in Missouri, $25, that is, one-half of the total gross revenue, would be credited to Missouri, and dealt with as if earned by the Missouri part of the system. (Sturgis' testimony, Record, Vol. 1, pp. 242, 257-8.)

This was the method of division of interstate revenue adopted by the General Auditor of the complainant company.

Then, by the addition of the gross revenue derived from intrastate freight to that portion of the revenue from interstate freight so assigned to Missouri, the gross revenues of the freight business of the company in Missouri were ascertained.

Great difficulty, however, is experienced in the effort to ascertain the expense of earning the intrastate freight revenue. The accounts of the company are not kept, and it would be impossible to keep them so as to show accurately the expense of earning the intrastate freight revenue. To a certain extent this must be a matter of estimate and opinion, it being impossible to segregate with precision, from the total expense incident to the handling of the interstate and the intrastate business, that part of it justly assignable to each class of the business. The total expense of the company in Missouri, incident to the handling of intrastate and interstate freight, may be approximately ascertained from the records and accounts of the company as they are kept. How this total expense is to be divided and a proper proportion of it charged to the intrastate freight business, is the most serious and troublesome question of fact to be determined in this case.

Early in the history of the litigation, the complainant introduced statements prepared by Mr. Sturgis, the General

Auditor of its entire system, who was also a principal witness on behalf of the complainant, showing in condensed form the results of the operations of the company in Missouri for the years 1904 and 1905.

The statement was as follows: (Record, Vol. 1, pp. 237-8.)

	1904.	1905.
Total number of Miles operated (June 30th).	8,326.16	8,561.64
Miles operated in Missouri "	1,031.89	1,141.79

Statement of Earnings and Expenses in Missouri for the Years 1904 *and* 1905.

EARNINGS.

1904.

	Local.	Interstate.	Total.
From Freight	$1,525,158.92	$6,199,300.13	$7,724,459.05
From Passenger	1,652,464.42	2,267,707.98	3,920,172.40
From Mail, Express, etc.	541,660.06	705,347.27	1,247,007.33
Gross Earnings.	$3,719,283.40	$9,172,355.38	$12,891,638.78

1905.

From Freight	$1,649,665.73	$6,735,454.71	$8,385,120.44
From Passenger	1,368,745.95	1,661,576.24	3,030,322.19
From Mail, Express, etc.	553,582.75	615,582.26	1,169,165.01
Gross Earnings.	$3,571,994.43	$9,012,613.21	$12,584,607.64

EXPENSES.

	1904.	1905.
Conducting Transportation	$3,852,409.27	$3,862,015.99
Maintenance of Equipment.....	1,327,733.79	1,653,440.56
Maintenance of Road & Structures.	1,635,794.43	1,750,867.36
General Expenses	703,231.94	812,483.64
Taxes	188,751.46	198,415.86
Proportion of Rental.....	3,169,369.73	2,974,501.50
Total Expenses	$10,887,290.67	$11,251,724.91

RECAPITULATION.

Gross Earnings	$12,891,638.78	$12,584,607.64
Gross Expenses	10,887,290.67	11,251,724.91
Net Earnings	$2,004,348.11	$1,332,882.73

"Complainant's Exhibit 1" (Page 1).

Earnings as Reduced Had Traffic of the Character Mentioned in the Act of 1905 *Been Carried at the Prices Therein Named.*

	1904.	1905.
Total revenue received on local business of the classes mentioned in the Act of 1905	$539,270.02	$526,532.72
Total which would have been received therefor had — been charged the rates authorized by the Act of 1905	365,499.65	355,410.65
Making a total diminution in revenue	173,770.44	171,122.07
Reduction in percentage of the local business	32.22%	32.49%
The total receipts from all local freight business in Missouri were less diminution in revenue as above	1,351,388.48	1,478,543.66
The expense of local freight business in Missouri computed upon the same basis as the total expenses, were	1,288,049.09	1,474,942.30
Net	$63,339.39	$3,601.36
On the basis of percentages		
Cost of earning each $100		
Extra cost of doing local business as estimated by experts		
Total cost of earning $100 in local traffic		
Local earnings of each $100 as reduced by the Law of 1905		

"Complainant's Exhibit 1" (Page 2).

These statements, in connection with the testimony of Mr. Sturgis in explanation of them, developed surprising results. According to them, in 1904 the net revenue from the

State freight business was $63,339.39. This was after deducting from the total State freight revenue $173,770.44, which amount represents the diminution in revenue from the transportation of articles mentioned in the act of 1905, which would have been experienced by the company if that act had been in force during that period and the company had complied with it. But it was not in force, and therefore, to the net revenue derived from the handling of State freight during that period should be added the $173,770.44, making a total net revenue from that source for that year of $237,109.83. This, according to Mr. Sturgis, was upon the basis of apportioning to the State freight such a proportion of the total expenses of the company in Missouri, incurred in *all kinds* of business, as the gross earnings of the State freight business bore to the gross earnings from all business, and apportioning to the interstate freight business its share of expense by the same method. In other words, the first step in his calculations was to divide the total expenses of *all* business, freight, passenger and miscellaneous, among those different kinds of business, in proportion to the gross revenues of each kind of business respectively. This resulted in a certain sum as the expense of the State freight business, and a certain other sum as the expense of the interstate freight business.

This process was the same in effect as if he had assigned to the entire freight business (both State and interstate) its proportion of the total expense of all business, in proportion to earnings, and then divided the part so assigned to the freight business between State and interstate freight. The result is the same. As he says: "I merely left out the intermediate step." (Record, Vol. 1, p. 248.)

But Mr. Sturgis did not stop here. He said that as between State and interstate freight, this would not be a fair apportionment of the expenses, because, in his opinion, the ex-

pense of doing the State freight business was from 3 *to* 7 *times as much, in proportion to revenue,* as the expense of doing the interstate freight business. (Record, Vol. 1, pp. 245-6.)

Estimating, as he did in his testimony, that the expense of the State freight business was at least three times as great, he proceeded to multiply the gross revenue derived from State freight business by 3. Then, for the purpose of dividing the expenses, he treated the sum so produced by multiplication as representing the revenue from State businsss; and he then divided the total freight expense between the two classes of freight business, in the proportion which the State revenue so multiplied and the actual interstate revenue bore to each other.

By this method of computation, it appeared that if the act of 1905 had been in force in 1904, and the company had obeyed it, the company, instead of making a net profit upon its State freight business of $63,339.39, would have actually lost $1,773,263.94 (Record, Vol. 1, pp. 246-7, 269); that is to say, it would have cost the company $3,298,422.86 to earn from the local or State freight business a gross revenue of $1,525,158.92, or, excluding from operating expenses taxes and what was termed "proportion of rental," the net loss would have been $809,483.16.

But the law was not in force in 1904, and the company was, during that period, charging substantially the same rates which had prevailed for years. Yet, according to Mr. Sturgis, the company actually lost on its State freight business in 1904, $1,599,493.50, being the $1,773,263.94 less the $173,770.44 diminution in revenue affected by the act of 1905. Or, excluding from expenses the "proportion of rental," the *actual loss* sustained by the company on account of its State freight business in 1904 was about $630,000. (Record, Vol. 1, p. 270.)

And applying the same unerring system of mathematics, Mr. Sturgis reaches the conclusion that his company, in the year 1905, if it had complied with the act of 1905, would have lost on its State freight business $2,002,289.51; that is to say, it cost the company $3,480,833.17 to produce from its State freight business a gross revenue of $1,478,543.66, or, excluding taxes and "proportion of rental" from the operating expenses, the deficit on State freight business would have been $1,038,812.77. And as the company did not in that year comply with the act of 1905, but charged rates in disregard of it, and as its revenue would have been $171,122.07 less if it had obeyed it, the actual loss sustained by the company on its State freight business under the rates *as they were before the enactment of the law*, was $1,831,167.44, being $2,002,289,51 less $171,122.07, or, excluding taxes and "proportion of rental" from operating expenses, its actual loss under the old rates was $867,690.70, being $1,038,812.17 less $171,122.07. (Sturgis' testimony, Record, Vol. 1, p. 349.) And in the opinion of Mr. Sturgis, these were *minimum* estimates of the loss of the company on State freight business in those years.

The mileage of the company in Missouri is 1,031 miles; of the whole system 8,326 miles. (Record, Vol. 1, p. 265.) According to these calculations of Mr. Sturgis, the company, on its State freight business in Missouri, *lost*, in 1904, $1,720, or ("proportion of rental" excluded from operating expenses), $785 *per mile;* and that, too, *in a State where the net earnings of the company for the same period upon its entire business in the State were* $5,013 *per mile*, while the net earnings upon its whole system were *only* $2,347 *per mile.* (Record, Vol. 1, pp. 266-7.)

And these tremendous losses were sustained in one of the richest parts of the territory traversed by a road which in the same year paid a 7 per cent. dividend upon its entire

capital stock of $110,000,000, interest upon its bonds for $170,000,000, placed in its sinking fund about $700,000, and had left a surplus of several million dollars. (Record, Vol. 1, pp. 276, 297, 725-6.) Figures which show that a system so highly prosperous as a whole has experienced such disaster in a favored part of its territory naturally challenge attention and provoke surprise.

The method by which Mr. Sturgis reached these startling results, shall appear in his own language:

> The direct examination of Mr. Charles I. Sturgis, by Judge O. M. Spencer, was continued as follows:
>
> Judge Spencer:
>
> Q. Referring again to the statement you filed as an exhibit at St. Louis in your testimony there recently on page 1 of Exhibit 1, what are the gross earnings named there, what is the amount stated?
>
> A. The gross earnings for the State of Missouri from both local and interstate business for the year 1904 is $12,891,638.78.
>
> Q. How did you arrive at the gross earnings?
>
> A. I arrived at them from the original records.
>
> Q. I understood you made them up from the original records; but how did you get this amount as earnings on the property in Missouri?
>
> A. This is the earnings on the total, local and interstate together, that total figure, and that is made from the original records; that is in actual figures, as nearly as we could figure it. The way we arrived at the Missouri proportion, where it was interstate business, varied with different classes of business. In case of freight, it was divided on mileage; in case of tickets it was divided on mileage; there were certain miscellaneous earnings that had to be divided on one basis or another. I think I explained that at the previous hearing.
>
> Q. You spoke of dividing it upon a mileage basis: You may explain how that is as to interstate business.
>
> A. Take a shipment, for instance, that would

come from Chicago to Kansas City. We would have the division of mileage to the Mississippi river, and find out what per cent Missouri's mileage was, and apply that to the total earnings on that shipment.

Q. What are the gross local earnings in Missouri?

A. The gross local earnings for the year 1904 were $3,719,283.40.

Q. How did you ascertain that amount to be the gross local earnings?

A. We ascertained it in the case of freight directly from the waybills that covered shipments entirely within the State of Missouri; in the case of tickets, from the tickets covering passengers that traveled entirely in the State of Missouri.

Q. What was the total expense of all business in Missouri?

A. For that same year?

Q. Yes, 1904?

A.. For that same year, $10,887,290.67.

Q. After deducting the total expense from the total earnings, what were the net earnings for Missouri?

A. The net earnings for the year 1904, $2,004,-348.11. I would like to explain there, in regard to the expenses for the year 1904, that when we had made up our figure, of course it is made up from a very large number of detail figures; it was made up in the first place rather hastily, and I understand that the expert found that our figures were about five thousand dollars too low, $5,007, or something of that kind.

Mr. Hagerman:

Q. You mean by "expert" the expert for the State of Missouri?

A. Yes, sir.

Q. Give us his name?

A. Mr. Fisher. Afterwards his representative and mine went over and checked the figures together, and I found the correct figure was about fifteen thousand dollars greater than the figure here shown (indicating Exhibit 1). As that would cut comparatively a small figure in the final result,

although favorable to the railroad company, we have not changed those figures, as they had already been presented to the court.

Judge Spencer:

Q. What per cent. or proportion of the total earnings are the local earnings in Missouri?

A. Approximately thirty per cent., or a little less. That is, the local earnings are $3,719,283.40, and the total earnings are $12,891,638.78.

Mr. Hadley: I have been endeavoring to get some agreement of counsel about the terms that we should use in applying to the same thing, in order that there may be no misunderstanding between counsel, the witness and myself. That which is known as intrastate or state business is designated in the statements of the Burlington, from which Mr. Sturgis is now testifying, as "local" business; and yet what is known as local freight is an entirely different thing from the standpoint of railroad terminology, as I am informed, than interstate freight would be.

Mr. Hagerman: The expert has used certain terms in his statement.

Mr. Hadley: I simply want to avoid confusion by seeing that we understand the same thing.

The Master: I understand the term "local," as used in this paper by the witness, to mean local in the State.

Judge Spencer:

Q. Is that right, Mr. Sturgis, that the term "Local" means intrastate?

A. Yes.

Q. What per cent. of the total earnings is the total expenses of the business, Mr. Sturgis?

A. You refer to all Missouri business?

Q. Yes.

A. For the year 1904, 84 and a fraction; for the year 1905, 88 and a fraction per cent.

Q. How did you arrive at the expense of doing local business, if you have made any calculation on that?

A. In arriving at the expense of doing the local business, we take the same per cent. that the expenses are to the earnings on the whole Missouri

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business. In other words, 84 and a fraction per cent. for 1904, and 88 and a fraction per cent. for 1905.

Q. You mean of the business of those years?

A. Yes, sir.

Q. Of the gross Missouri earnings?

A. Yes, sir.

Q. That is the basis upon which you computed the earnings in Missouri, and the expenses in Missouri, as shown by the statement you have furnished for file?

A. As on this statement, is expense figured for the total local business shown? The only figure of expense shown in regard to the local or intrastate business is on the freight business.

Q. In arriving at the expense on the local freight business, you use the same per cent. that you did on the gross earnings?

A. Yes, sir.

Q. And you also assume that the cost of doing the business, for the purposes of that statement, was the same in each case?

A. Yes, sir.

Q. I will ask you, as a matter of fact, whether that is true or not; whether the cost of doing local business is the same, or whether it is greater than doing through business?

A. That is a matter of judgment, because there is no possible way of determining actual cost of doing intrastate business as distinguished from all business in the State. In my judgment this basis was used here, because used in previous cases. But, so far as I have gleaned, and can judge from experience, not only from general experience on this road, but also from experience in figures I have seen on other roads, the cost of doing the local or intrastate business would vary anywhere from three to seven times as much proportionately to the earnings as doing all business in the State.

Q. Are you familiar with the elements that go to make up that extra cost of doing local business?

A. I am with some of them.

(Previous answer of the witness is read.)

The Witness: I wish to correct that answer

by cutting out "experience on other roads." I wish to omit the implication that I have had experience in this on other roads than the Burlington.

Q. Taking into consideration, Mr. Sturgis, the local freight shipped from terminal points to points in Missouri, the amount carried, the time consumed on the journey, the local freight picked up and distributed, salaries of the station agents, engineers, and all employes, what would you say was the difference between the cost of doing the local traffic in Missouri and the cost of doing all other business, through business?

A. It seems to me you are setting aside a certain part of the expenses there.

Q. Including those and all other expenses that you know of, what, in your judgment, would be the relative cost of local business as compared with through business?

A. *From three to seven times.*

The Master:

Q. You are using the word "business:" Do you mean to confine that, Judge Spencer, in your interrogatory, and do you, Mr. Sturgis, mean to confine in your answer the word "business" to freight business, or do you also include passenger business?

The Witness: I am talking particularly about freight busines.

Judge Spencer: I was asking about freight business.

Q. Have you made a computation upon the basis of the cost of doing local business, assuming the cost of local business to be three times the cost of all freight business: Have you made a computation showing the cost of doing the local business in Missouri?

A. Yes, sir.

Q. State what figures you used in making that computation, and what was the result?

A. For the year 1904 we found that the earnings on local or intrastate freight were 11 and a fraction per cent. of the total earnings on all State business. And in order to determine, therefore, the share of the expenses which are apportionable to

local freight traffic, provided the cost is three times as great, it is necessary to multiply this 11 and a fraction per cent. by three. We then have a figure which, of course, we cannot add to the 88 and a fraction per cent. of expenses, which represented the expenses of the interstate business, because, by so doing, we would have more than the total expenses; therefore, the regular, mathematical rule, as I understand it, is to take the proportion of the two figures that we then have, and apply them to the total expenses.

Stating that in that way, it will probably not be followed, because it was rather difficult to figure it out myself, when I had paper and pencil before me and time to think over it. But if I may take some simple per cents., I can illustrate what I mean: Suppose, for example, that the local business is 20 per cent of all business; that gives us 20 per cent. and 80 per cent.

The Master:

Q. 20 per cent. local?

A. Yes, sir; and 80 per cent. on the interstate. You multiply the 20 per cent. by three, which gives you 60 per cent. Now, you have 60 per cent. and 80 per cent., which, of course, is in excess of 100 per cent., but they bear the proper relation to each other, and, therefore, to work out the problem, you add the 6 and the 8, and get 14. The interstate business, therefore, has for its share of the expense 8/14 of the total expense; and the local business has 6/14 of the total expenses for its share. That, I am satisfied, is mathematically correct as a principle.

Q. Or, reduced down, it would be 3/7 and 4/7?

A. Yes, sir. Now, working it out on that basis, which I believe cannot be questioned, it is a purely mathematical rule which, although I haven't seen it used since I left college, I am satisfied is correct. Working on that basis, we found for the year 1904, of the ten million eight hundred and eighty-seven thousand odd dollars of expenses on all Missouri business, seven million, seven hundred and sixty-two odd thousand dollars represents the expense

on the interstate business, and three million, one hundred and twenty-four odd thousand dollars represent the expenses on the local or intrastate business. If, then, we take this figure which is exactly $3,124,652.42 as the expenses, it gives us as a result, instead of the net shown on sheet 2 of $63,365.69, a deficit of $1,773,263.94.

Mr. Hagerman:

Q. It makes the change on sheet two of "Exhibit 1?"

A. Yes, sir.

Mr. Hadley:

Q. I didn't understand the witness to state (I didn't hear, on account of the confusion), what sum he subtracted the figures 3,124,652.42 from, in order to get the $1,773,263.94 deficit?

A. I did not state the steps in that computation. However, I can tell you in just a few words. That represents the total cost of this intrastate business freight. We have, right on that sheet 2 of Exhibit 1, $1,288,031.79.

Judge Spencer:

Q. That is the expense of local business, computed on a single cost basis?

A. Yes, sir. Now, I found the difference between the figure on a single cost basis and the figure on the three cost basis, and that difference is $1,836,620.63. From that I deducted the $63,-356.69 shown as net earnings, the result being the $1,773,263.94, given above as a deficit.

Q. Mr. Sturgis, in making that computation by which you arrive at the fact that the local business is 11 and a fraction per cent., you included in the total operation expenses taxes and rental?

A. Yes, sir.

Q. That is, the $10,887,290.67 which is given on page 1 of Exhibit 1 as "gross expenses," you included in that the item of taxes and rental?

A. In the first part of your remark you have confused the figures somewhat. The 11 and a fraction I referred to was the per cent. of earnings on intrastate business, of earnings on all business. The figures you are referring to, as I understand, are operating expenses and per cent. of the total.

In other words, on sheet one the $10,887,290.67 shows as the expense of 1904, it includes taxes and rentals.

Q. Then you have taken three times the same proportion of those items in your calculation, haven't you?

A. Yes, sir.

Q. Now, have you made a calculation, after eliminating those two items, so as to base your sum on the total expenses, not including taxes or rental?

A. Yes, sir; I have made such a computation, *but I delieve the taxes and rental should be included.*

Judge Spencer: I do, too, but I want to put it in both ways, because I don't know how the court may feel about it, and I want to show it in both aspects.

Q. What is the cost of local business on that basis?

A. The cost of local business on that basis is $2,160,871.64, and that will make the net deficit for 1904 on intrastate business in Missouri $809,483.16, instead of the net earnings as shown of $63,356.69.

The Master:

Q. The figures being testified to by the witness now are nowhere shown on Exhibit 1, as I understand it?

A. No, sir.

Q. They involve other computations?

Judge Spencer: Yes, sir; for which we will file other exhibits.

Q. In making this computation, you have assumed the new rates to be in effect. In other words, you have taken the rates proposed under the new law?

A. Yes, sir.

Mr. Parker:

Q. In other words, assuming the new law to be in effect, and assuming that to perform the service necessary to State business exceeds in proportion the cost of total business, as three to one, the operations of the Burlington on State business for 1904 will show a deficit of over $800,000?

A. Under the last computation, yes, sir.

Q. And that, counting nothing for the use of the property or taxes?

A. You are correct.

Judge Spencer:

Q. And that deficit would be increased by charging the local freight in Missouri with its proper proportion of the taxes and the rent, whether it be 11 per cent., or three times 11?

A. Yes, sir.

Q. You have not made any computation showing what the deficit would be by charging 11 per cent. of the rental and taxes, have you?

A. I have no completed computation. That is what I was working on just now.

Q. I know, but the court does not want you to take up the time to figure that way. We will ask you for that, and you may figure on it later.

The Master:

Q. What is this 11 per cent. to which you have been referring?

A. It is the per cent. representing the proportion of earnings on intrastate freight to the earnings of all Missouri business, both inter and intrastate.

Q. You mean by that, freight business?

A. The entire business.

Q. The entire business, including both passenger and freight?

A. Yes.

Q. Why do you involve in your computations here the element of expense and of revenue derived from passenger business?

A. In the way the expenses on local business are ascertained, it makes no difference whether you take that direct step from expense on all Missouri business to expense on local freight, or take the intermediate step, going from expense of all local business to expense of all Missouri freight business, and from there to the expenses of the Missouri local intrastate freight.

Q. In this computation you have just made, you have only treated of freight, have you?

A. That is all.

Q. There are no passenger earnings or expense in the computation you have just made?

A. Yes.

The Master: That is what I supposed. I understand the witness to say this per cent. of 11, or ratio of 11, has reference to all business, both passenger and freight.

Mr. Ladd: He said 11 per cent. was the ratio between local freight earnings and the entire earnings in the State.

The Witness: Your Honor, the earnings on all Missouri freight is approximately 60 per cent. of the earnings on all Missouri business, and the earnings on Missouri local or intrastate freight are 19 per cent. of the earnings on all Missouri freight. That results in that 11 per cent. of the total earnings.

Q. Freight earnings?

A. No, total earnings.

General Hadley: In other words, that 11 per cent. represents the ratio of the earnings on local business to the earnings on all Missouri business.

The Witness: I merely left out the intermediate step.

Q. You mean, according to your statement, it is 11 per cent?

A. Yes, sir.

Judge Spencer:

Q. The only difference in the figures you are now giving and those you furnished the Attorney-General is that in this computation you assume the cost of local business to be three times as great as the cost of doing all business?

A. Yes, sir.

Thus early does Mr. Sturgis, a principal witness for the complainants in this litigation, set the pace for those who follow him. The same witness, more than two years afterward, at the last moment of the trial, produced, as representing the earnings and expenses of his company in Missouri

for the year ending June 30, 1908, a combination of figures even more startling, more difficult of acceptance. His later statement will be referred to hereafter in this brief.

B.

ESTIMATES OF EXPENSE BY COMPLAINANT'S WITNESSES.

The estimates of the relative proportion of expense incident to the State freight business and the interstate, as offered by complainant's witnesses, varied widely, as will be observed from an examination of their testimony. It will also be noted that some of these opinions as to expense were based upon the amount of revenue derived from the two classes of business respectively, while some of them gave no consideration whatever to the feature of revenue, and declared that it had no connection with expense.

The following is a summary of these estimates:

The additional expense of doing State business, according to the opinions of complainant's witness.

Howard Elliott (Record, Vol. 1, p. 427):

> "Q. Is there in your opinion any difference in the cost of handling local freight and the cost of handling through freight?
>
> A. Yes.
>
> Q. What, in your opinion, is the relative cost or expense of handling the two businesses?
>
> A. I think it is rather difficult to say exactly. I should say anywhere from three to six or seven times greater for local business as compared with through, depending on the class of the branch and the amount of business on the branch."

Again (p. 439):

"Q. Your answer, as I took it down—and I tried to take it down exactly—was that the additional expense for handling local, as compared with through business, was from three to six times as much?

A. Yes, sir.

Q. That you have already explained was a comparison of local freight business with through freight business?

A. Yes, sir.

Q. Do you mean by the expense of handling a ton of freight per mile in your local freight business was three to six times as much as the expense of handling a ton of freight per mile in the through freight business?

A. In a general way, yes. * * * *

Q. You are not undertaking to make any comparison between expense in proportion to revenue?

A. No.

But in a moment he says (pp. 440-1):

"Q. I don't mean you have no knowledge of other factors, because I know you have. But the point I am getting at is, that you are simply taking into consideration the increased expense of operation, without reference to the revenue that may be produced by the handling of the local freight as compared with through?

A. No, sir; I wouldn't say that. That is the reason I said from three to six. If we take into consideration the higher local rates, I should say three times. If we throw out the question of rates entirely, I should say six times. Assuming that the local rate is the same as the through rate, I should be inclined to use the multiple six, or even higher.

Q. It was on the idea that the local rate was at least twice as high as the through rate, that you gave the minimum of three?

A. I did not figure any particular rate, but I knew, of course, that the local rate was higher. I did take that very idea into consideration in using the statement three to six. If you are going to fig-

ure it on the exact basis of local rates being what they are, if they are considerably higher, then your multiple would be three. If you take the local rates the same as the through rates, your multiple would have to be higher.

Q. In other words, the percentage of the revenue or earnings upon local freight to the earnings upon local and through freight, would not be the same percentage as the expenses of doing local freight business, unless it was assumed that the revenue derived by the company per ton per mile on the two classes of freight was the same?

A. The ratio would not be the same unless you assumed that.

Q. And it was upon the theory that the rates were the same upon the two classes of freight that you gave your idea as to the increased expense?

A. That would be, as I say, in a general way. If you are going to get exactly the same rate on your local tonnage as you do on the through, my thought was that you could figure that it would cost you anyway six times more. It should be multiplied by six instead of three to get the devisor of the total expenses.

Q. Consequently a system of apportioning expenses to local as compared with through business, on the relation between the earnings upon local as compared with the earnings upon all freight business, must necessarily involve the consideration of whether there is a greater or less revenue to the company per ton per mile on the two classes of freight?

A. If you are going to figure on a revenue basis you take a lower multiple than if you have the tonnage multiple. If you take the tonnage basis you have a higher multiple to figure by."

Mr. Willard said (Record, Vol. 1, p. 494):

"A. In my opinion the cost of doing the local business, as you have described it, would be none less than three times as much as the doing of the

other business you have mentioned, and it probably would be more than that. I do not hesitate to say that in my opinion it is not less than three times."

And again (p. 496):

"A. I do not know that the ratio of one to three would obtain all the way through. But, of course, in getting at the results of one to three I had that in mind. Some expenses incident to local expenses would be 100 per cent., as applied to through service. On some there would be very little difference. But the sum total of it, all would be that it costs three times as much."

Again (p. 508):

"A. I will say that a ton of freight originating in one point in Missouri and going to another point in Missouri is what I have in mind when I speak of purely State freight. I think it costs three time as much to handle that kind of business as it does a ton of freight starting from some point out of Missouri and going through the State to some point out of Missouri, or starting from some point out of the State and coming into the State; or starting from some point in the State and going to some point out of the State. And when I say I think the ration is as one to three, I have in my mind all the elements that enter into the cost of that operation, and not simply the going a small way on the through freight, as you have stated."

Again (p. 511):

"A. In saying what I have about the relative cost of doing the business, I have not had in mind at any time the revenue received from the business, because I know nothing about it. So, when you speak of the relation of the earnings (expenses?) to revenue, I have no answer to make. I have no definite knowledge about it."

Mr. Harris said (Record, Vol. 1, pp. 537-8):

"A. I think it would cost from three to five times as much to do the so-called local business.

Q. You are using that term now to express the idea of State business?

A. I mean by "local" business that which has its origin and destination in the State. From three to five times as much as it costs to do all other business.

Q. Have you in your mind subdivided that in any way, or could you express it in a subdivision, how many more times the through as distinguished from the second class of interstate business costs?

A. I don't think I have a sufficiently clear idea. I know there is a difference. By all odds the most expensive is that just described; and the next is the business which merely crosses the State line. And the least expensive is the business which makes a long march through the country, and goes through the State of Missouri.

Q. But taking it all in all, and averaging it all up, you would say three to five times is the cost to do State freight business as to do interstate business in Missouri?"

Mr. Rawn said (Record, Vol. 1, p. 568):

"A. In my experience and the basis upon which we predicate our cost of operation, the cost of handling *local freight*, as we term it, in comparison with that which we term *through freight*, and in accordance with our statistics in the matter, we find that the direct train cost for exclusive train operation, which I shall endeavor to deal with as one item, and with other items separately—*the direct exclusive train cost*, of that which we term *local freight*, is about *three and a half* times that of handling *through freight*. That is, I reiterate, what we term exclusive train cost, or direct train cost."

Mr. Rawn declined to express any opinion as to the relative expense of handling State and interstate freight.

Darius Miller said (Record, Vol. 1, p. 607):

"Q. You think that *three times* is all right *after giving the benefit of any increased revenue* that comes from it?

A. I think it is very conservative."

And, again, on cross-examination (p. 618):

"Q. What do you think, Mr. Miller, about the basis upon which Mr. Sturgis apportioned the cost of the State and interstate business of the road?

A. I have only seen part of his testimony, but I understand it is on the *revenue basis.* It seems to me *that is fair and reasonable as any basis.*

Q. I believe that Mr. Sturgis adopted the rule of taking the percentage of State business to interstate business, and multiplying it by three?

A. Yes. Assuming that the cost of the State business was three times that of the interstate.

Q. He assumed that?

A. He estimated it at that.

Q. And the total cost of all the local traffic in Missouri, according to the percentage resulting from multiplying the percentage of State traffic by three?

A. Yes.

Q. And then apportioning it in that way?

A. Yes."

Mr. Stuart testified (Record, Vol. 1, p. 691):

"Q. Take, for instance, how much more does it cost to do the *State business than the through interstate, where the stuff does not stop at all?*

A. Well, based upon my general experience, I should say it costs *from five to eight times more.*"

Again (pp. 691-2):

"Q. What would you say as to the additional cost on that second class of interstate business which I gave you, where it either originates in Missouri and goes out, or originates out and comes into Missouri?

A. It is rather difficult to separate that from what you call "State" business. But there is a difference in the cost. In answering your question I should say, from my experience, that it is not less than *twice as great.*

Q. You would fix that as the *minimum*, anyway?

A. Yes, sir; the minimum."

Mr. Stith said (Record, Vol. 2, p. 1492):

"A. I have a general idea about that, Mr. Clardy. I do not know that I could give you any definite figures. My impression of the matter and understanding has been the result of my connection with the business—I don't know that I have any detailed figures to submit—but it has always been my idea about it, that the cost of doing the *purely local business* was very substantially greater than the cost of doing *through business.* And it has always seemed to me that the cost would be up to fully *two and one-half times as much.*"

Mr. Doddridge testified (Record, Vol. 2, p. 1596):

"Q. Taking into consideration your knowledge and familiarity and experience with this Missouri Pacific property in the State of Missouri, taking into consideration all you know about the situation, carload lots, and less than carload lots, through shipments and way shipments, State as distinguished from interstate business, please tell the Master what in your judgment, or how much

more, in your judgment, it costs to do the State business than it does to do the interstate business?

A. In my judgment *State business* costs at a *minimum three times* as much as the *through business* and it may *reach six* or more times. Or, in other words, from *three to six or more times.*

Q. Three being the minimum?

A. Yes, sir.

The Master:

Q. In answering the last question there you used the word 'through' and I do not know that I quite understand you. In your judgment it costs from three to six times as much to do the local or State business as it does to do the through business, as you answered it. Did you mean by the word 'through' that it is synonymous with interstate?

A. Yes, sir. That is what I meant. I will state that the words interstate and through and local are a little bit confusing.

Q. That is why I asked the question?

A. According to the test here there was only 7 per cent. interstate at those stations, so it would not.

Q. As I understand, in your judgment and opinion, considering all the data you have, and your experience and knowledge of the conditions, particularly of the Missouri Pacific Railroad, it will cost three times, from *three to six times* as much to carry the *State business* as it costs to carry the *interstate business?*

A. Yes, sir; as a general average.

Mr. Hagerman:

Q. Three being the minimum?

A. Yes, sir; *I make it three, the minimum.*"

Mr. Clark said (Record, Vol. 2, p. 1631):

"Q. Taking your practical experience upon this Missouri Pacific railroad in Missouri, and all you know about it, and all you know about the character of the freight hauled, and the character of the business done, how much more does it cost

to take care of and to carry the State freight than it does the interstate?

A. *Four or five to one.*

Q. Four or five times as much?

A. Yes, sir."

And on p. 1632:

Cross-examination.

By Mr. Kennish:

"Q. Do you mean by that it costs four or five times as much to carry a ton of State freight as a ton of interstate freight?

A. Yes, sir.

Q. That would be on the *per ton per mile basis?* That is, a ton of freight for each mile carried, that it would cost the company *four or five times,* I understand you to say, as much to carry a *ton of State freight one mile* as a *ton of interstate freight one mile?*

A. *Yes, sir.*"

W. T. Fisher testified (Record, Vol. 2, p. 1740):

"A. From my knowledge of the handling of State and interstate freight, from what I know personally, and from the evidence that has been submitted in these various cases, I would say it would cost from *two to six times* more to do *State* than to do *interstate business.*"

On cross-examination he said (pp. 1751-2):

"Q. You say it would cost from two to six times more to do the State freight business than the interstate?

A. Yes, sir.

Q. Do you mean by that two to six times per ton per mile?

A. No, sir.

Q. What do you mean?

A. The actual cost.

Q. The actual cost of the freight carried?

A. The actual cost of handling that freight.

Q. Wouldn't that be the cost per ton per mile?

A. No, sir.

Q. Then on what basis would you make your estimate?

A. On the actual cost of performance. Find out what the actual cost is for moving the State and interstate freight on local trains, the proportion of State and interstate freight carried on local trains, for that particular time or given period, and take the actual cost of handling through freight and interstate freight on through trains. That is my method of getting at it.

Q. Is there any way of getting at that exactly?

A. It is approximate. You can approximate it. That is as near as you can get at it. In my opinion it is a more correct basis than your per ton per mile basis."

And in response to questions by the Master he said (p. 1753):

The Master:

"Q. I don't know that I quite understand you, Mr. Fisher, and it is very desirable I should do so—

A. I will try to explain.

Q. You say that in your opinion it will cost from two to six times as much to carry State freight as it costs to carry interstate freight?

A. Yes, sir.

Q. But you now say that you have no reference to the ton mile basis: Now, what did you mean then? What is your standard of measurement? What is your method of comparing the two different sorts of freight: Does it cost from two to six times to carry all the local freight that is handled by the Missouri Pacific that it costs to handle all of the interstate freight? Or does it cost two to six times as much to carry a single ton of State freight as it costs to carry a single ton of interstate freight? Or, does it cost two to six times as much to earn a dollar

in the transportation of State freight as it does to earn a dollar in the transportation of interstate freight: There must be some standard, and I want your standard.

A. It *costs from two to six times as much to earn a dollar* in State freight business as to earn a dollar in the interstate business.

Q. That is the basis of your theory?

A. Yes, sir."

And yet in the next breath (p. 1753) he says he does not take revenue into consideration:

Mr. Kennish:

"Q. Then why would you say two to six times, putting it all on that basis?

A. I said a little while ago that the reason for the difference in two to six times is to take account of the variation of interstate freight carried on local trains and State freight carried on through trains.

Q. On that basis now, do you take into consideration the rates received for the carriage of State freight as compared with the rates received for the carriage of interstate freight.

A. *No, sir; we are dealing only with the cost* of doing this business now.

Q. You do not take into consideration the rates on the two different classes of freight?

A. *No, sir; I have not taken that in.*"

Mr. Bethard testified (Record, Vol. 2, p 1824):

"Q. Taking everything into consideration, Mr. Bethard, what would you say as to how much more it costs to do the State business than the interstate business?

A. I should say it would cost *four or five times* as much, just off-hand. I have never gotten down to the actual figures."

Mr. Rainey said (Record, Vol. 2, p. 1837):

"Q. Taking everything into consideration, how much more, in your judgment, would it cost to do the State business than it would to do the interstate business?

A. That would also be an estimate. I have often thought upon that subject, and thought it would be *three or four times as much.*"

Mr. Miller testified (Record, Vol. 3, p. 2829):

"Q. *When*, (what?) in your opinion, is the conparative cost of doing the two classes of business, with respect to the State of Missouri?

A. I should say that the business in Missouri would cost to handle it *two or three times* as much as the interstate or through business, as it is handled on the railroad."

And again (pp. 2829-30):

"Q. Mr. Miller, I understand that considering all these things, and your past experience and knowledge of railroading matters in Missouri, and the operation of trains, in your judgment, if the two classes of business be divided into intrastate and interstate, that the expense of handling the intrastate business will be two or three times as much as handling the interstate business.

A. That is my impression."

And again (pp. 2830-1):

The Master: I do not understand that this witness is making any comparison between cost and revenue at all.

Mr. Minnis: I do.

The Master: He simply gives it as his opinion that the cost of transporting the local business would be two or three times as much as the cost of transporting the interstate business. Now, the cost

of transporting a given amount of freight, in the view this witness has given, has nothing whatever to do, so far as I can see, between revenue and cost, whether a given amount of freight was $1.00 or $1,000.00, the cost of moving that freight would be precisely the same. He is not making any comparisons, as some other witnesses in this case have done, between cost and revenue.

Mr. Minnis: He is making comparisons, I understand, from something he said before he went on the stand. On account of the local rates being comparatively higher.

Mr. Ladd:

Q. What about that, Mr. Miller?

A. The local rates are higher than the interstate rates.

Q. In (Is?) you opinion based upon the theory that including the higher local rates that still the cost would be two or three times more for doing the local business than for doing the through business, in addition?

The Master: Do you mean cost in proportion to revenue?

Mr. Minnis: I mean whether the cost of doing the local business in addition to the additional higher rate would be two or three times as much.

Mr. Ladd: Mr. Miller answered no.

Mr. Minnis: What would be your position in respect to that?

A. I understood your question to be a comparative cost between through and local business, the comparative cost of handling *through and local* business.

Q. Is that cost compensated for in the higher rate that is made for local business?

A. No, sir; I do not think the local rates are three times the through rates.

Q. Do I understand your opinion is based entirely upon the cost of doing the business *without regard to the rates charged?*

A. *Entirely on the cost.*

The Master: That is the way I understand the witness."

And again (p. 2860):

"A. Assuming the through business could be handled at four mills per ton per mile, according to my estimate it would make the cost of handling the local business *three times* that.

Q. *Four mills?*

A. Yes, sir.

Q. It would make the State business cost *twelve mills?*

A. Yes, sir.

Q. You said *two or three* times; then it would be *eight* or *twelve* mills?

A. Yes, sir."

Mr. Gray said (Record, Vol. 4, p. 3931):

"Q. What, in your judgment, does it cost more to do the State freight business than the interstate, how much more?

Q. I have given that a very great deal of thought, Mr. Hagerman, and my best conclusion on that is that it costs from *three to five times* as much to do the freight business which is purely state as it does to do the interstate and trans-state jointly.

Q. By trans-state you mean that which starts outside the State and passes clear through?

A. Yes, sir.

Q. And then there is a class of interstate business which originates in the State and goes out, or else comes from a point without the State and is destined to a point within the State?

A. Yes, sir.

Q. And the State business is where it is wholly within the State?

A. Yes, sir.

Q. On what basis do you give these figures, the *ton mile basis* or the *revenue basis?*

A. *I really had no particular basis in mind;* I was attempting to treat the matter in its physical aspect."

And again (p. 3969):

"Q. Now, taking your ton mileage as a basis, and what conclusion do you reach as to the *relative cost of producing a ton mile* in the State service as contrasted with the interstate service?

A. I have been convinced for some time, as I testified this morning, or last evening, that for the various reasons which I have given, this relative proportion is *somewhere between three and five.* If I modified that in any way I would say that it was *somewhere between three and six.*".

Mr. Tyler testified (Record, Vol. 4, p. 4101):

"A. Freight, I think the difference in cost is *somewhere between three and five times* as great. I would say *nearer five times than three,* on the general average."

But the witness in his cross-examination candidly confesses to the utter absence of any basis whatever. His "three to five times as much" is simply a glittering generality. It is neither three to five times as much "per ton mile," or "per train mile," or "in proportion to earnings." It is simply "three to five times as much" in proportion to nothing, leaving the trier of fact to wonder and guess as best he can what, if anything, "three to five times as much" really means.

He said (p. 4128), after repeated efforts of the examiner to ascertain what he meant:

"Q. All that goes to the matter of justifying your statement as being more or less accurate. I am simply trying to get at what the statement itself signifies, because it requires another factor to make it intelligible to me.

If you say it means it costs three to five times as much to earn a dollar in State revenue as in in-

terstate revenue, then I can get at the cost, because I am advised by other evidence, we will say, that the average rate per ton per mile on State revenue is twice that it is on interstate. That gives me an approximation of six to ten times as much per ton mile. But there is the difference, you see, of one hundred per cent. as depending upon your applying it to the ton mile basis or to the revenue basis. One is twice as much as the other. That variation is rather wide, if we could possibly avoid it.

A. *I have no reference at all to the question* of the earnings of a certain amount, or the *question of revenue at all.*

Q. *Do you have reference to the ton mile?*

A. *I have never based my calculation upon the ton mile.*

Q. *Have you reference to the train mile?*

A. *No, sir; they do not fit it at all.* The train mile does not fit for the reason that the local train may carry freight or may not, and yet it runs.

I did not make my estimate with reference to the train mile.

Q. *Neither did you make it with reference to the ton mile?*

A. *Not as ton mile.*

Q. *Neither did you make it with reference to the revenue received?*

A. *No, sir.* Now, with reference to the service performed, I do make it. With reference to moving a shipment of freight, such as ordinarily offered for local, and what you must do with that freight in order to haul it to its *detsin* destination and deliver it, and a shipment of freight offered for a long, through haul, or for the average through haul, without regard to the rate that the shipment brings, based entirely upon all of the conditions entering into the service *as between local and through,* I base my reply or estimate."

The testimony of this witness, from page 4123 to page 4128, discloses, unconsciously to himself, the utter want of practical meaning to the stilted formula "three to six times as much," "two to four times as much," "three to seven times

as much," which, in one or the other of these or other similar variations, appears in the evidence of complainant's witnesses with ceaseless reiteration, *but with minimum figure always large enough* to suit any theory which may seem most plausible.

Mr. Whitenton testified (Record, Vol. IV, pp. 4157-8):

"Q. I understood you to say on direct examination in answer to Mr. Hagerman, that on the revenue basis it would cost twice as much to do State business as interstate; what did you mean by that?

A. What I meant by that was *this expense in connection with earnings would be about two to one as between the two classes.*

Q. That is to say, it would cost about *twice as much to earn a dollar in State as in interstate business?*

A. Yes, sir."

Mr. McPherson said (Record, Vol. IV, p. 4288):

"In my judgment the cost of handling State freight traffic is *several times* that of handling interstate traffic.

Mr. Clardy: Did you say several times?

A. Several times."

And again (pp. 4303-4):

Mr. Clardy:

"Q. I do not want to interrupt you, but are you prepared to give an opinion as to how much more the transportation and handling of State traffic requires than interstate traffic?

A. The range is over 25%.

Q. I am talking about freight now?

A. Oh, beg pardon, how much more—

Q. How much more is the extra cost of handling State freight than interstate freight, how many times?

A. We can determine in reaching a conclusion; that is, a railroad man in practical, every day service, can determine in reaching his conclusion that in certain parts of that service the cost is four times, like the matter of maintenance and use of cars; and that in the matter of efficiency it may be eight times. So that his conclusion is somewhere between four and eight. My conclusion is between four and eight, and I do not know that I can reduce that to make it appear any more positive by saying *six or five*. I have taken these elements I know that cost four times as much, and those that cost six times as much. Their relation in dollars and cents would be very difficult to determine. We know they exist, so that *the excess cost is between, in my judgment, based on my experience, four and eight.*"

C.

THE CAUSES FOR INCREASED COST OF HANDLING STATE FREIGHT AS ASSIGNED BY COMPLAINANT'S WITNESSES.

A great number of reasons were advanced to account for this alleged larger cost of the State freight business. The principal ones were the following:

1. The length of haul of State freight is less than that of interstate, with the result that the terminal charges are distributed over a shorter distance, which fact renders those charges relatively larger for the shorter haul.

2. There are two terminal charges for State freight, and but one for interstate.

3. There is much waste space in a freight car in local service; it is not filled to its capacity.

4. Not as much use in 24 hours of a local freight car is obtained as of a car in through business. The way trains make fewer miles in a day; they must do switching, loading and unloading at stations. Way trains must do their work in daytime and lie up at night.

5. The local train contains fewer cars; and an engine which could easily pull more cars loses part of its efficiency.

6. The wages of the train crew are larger on local than on through trains and the consumption of fuel greater.

7. The liability of injury to trainmen and to other persons at stations is greater in the case of way trains.

8. The tracks and other facilities, which are used entirely for local business, are expensive. The road was originally intended for local business, and therefore the maintenance of facilities originally provided for the accommodation of local traffic should now be charged to that traffic.

9. The labor at local stations is employed constantly and used occasionally.

10. The haul of an empty car for loading at a local station is sometimes long for the purposes of a shipment for a short distance.

11. The wear and tear of the equipment of a way train is greater.

12. Local trains must run whether there is business or not.

13. The local business is rehandled, more or less; at unimportant stations the freight in less than car load lots in the warehouse and car load business in the yard.

14. The way freight trains carry passengers, who are greatly exposed to injury upon them, entailing an additional cost.

15. The casualty claims for injury to State freight are larger.

16. The expense of billing less than car load freight is much greater than that incident to car load freight.

17. The wear of way is greater from way trains than from through.

The foregoing summary, it is believed, embraces all the material elements of increased cost incident to the transportation of freight within the limits of the State, mentioned by the complainant's witnesses. If any are omitted, it is by inadvertence.

Excerpts from the testimony of some of the principal witnesses for the complainant upon these points are here reproduced to exhibit the showing made in the court below of the ground for the contention that the cost to the company of State freight business is much greater than that of interstate.

(1) The shorter haul of State freight, and the resulting larger proportion of terminal charges.

Howard Elliott testified (Record Vol. I, p. 427):

> "Well, to begin with, the local business is generally all quite a short haul. In Missouri, for example, I should say there was a great deal of business that was handled less than fifty miles; so that you have a terminal charge for loading the local business at the initial point, and another terminal again a short distance away. So that your terminal charges accrue much more frequently for a given volume of local business than they do for a given volume of through business."

Henry A. Gray said (Record, Vol. I, pp. 683-4):

"Q. Now, what figure does the shorter haul cut? As I understand you, you say you make up for the short hauls of 25 miles; the expense of doing that increases in proportion as the revenue increases?

A. The principal increase is that matter of terminal expense.

Q. In the question of these short hauls?

A. Yes, sir; in short hauls and long hauls, that is the principal expense. You get your goods, load them into the car, and start your car. Now, the car is running. It does not necessarily make any difference whether you carry it a hundred miles or two hundred miles, for the running expenses per ton or per hundred pounds, until you strike a point where you have got to do some switching, or run into a terminal expense again. Of course, there may be matters of topography, if you run through a tunnel in one case or over a prairie country in another case; or there may be questions of climate or seasons; you may be running over green fields, or over a snow bank. Things of that kind may enter into it. But so far as the general question of rates is concerned, the principal things that affect it as between the long and the short haul is the question of the terminal expense."

W. B. Doddridge said (Record, Vol. II, p. 1587):

"First, in considering the State business you have the constant expense of two terminals, and, second, you have the shortness of the hauls as compared with the through business."

H. G. Clark testified (Record, Vol. II, p. 1642):

"Q. You were interrupted two or three times when you were giving your reasons why State freight costs more than interstate, and I would ask you whether the difference in the haul cuts any figure; that is, State freight as a rule is a short haul as distinguished from the long haul for the interstate freight?

A. Yes, sir.

Q. That is an element that enters into it?

A. Yes, sir; that is an element.

Q. All State shipments necessarily have two terminals?

A. Yes, sir.

Q. That is not so with the interstate freight?

A. True.

Q. Except through Missouri?

Mr. Kennish: I submit that the witness be permitted to answer the question.

The Master: The questions are leading.

Mr. Hagerman:

Q. Those are elements in addition to those you mentioned: Do they cut any figure?

A. The question of short haul cuts quite a figure. It emphasizes the fact that we must often haul an empty car to some small station, for a short haul small load, which we would have to do a bit of on through business."

Henry Miller testified (Record, Vol. III, p. 2829):

"The loading and unloading of a car is what takes up the time of the equipment. And whether you have a long haul or a short haul for each load makes quite a difference in the cost."

And again (Record, Vol. III, p. 2869):

Q. What are the extra items of cost?

A. The State carload—or the movement of any carload, or any freight—involve handling at two terminals, at least; and the nearer you move those two terminals together the higher the cost.

Q. Two terminals. On the State carload you say there are two terminals used. How many on an interstate carload, one?

A. I believe I stated that all freight involved at least two terminals. Now, the nearer you bring those two terminals together the more it costs per ton per mile to handle that freight, because the terminal charges must come out of your transportation revenue.

Q. You mean if the haul is shorter in one case than it is in the other, that makes the average of

the terminal expense larger in the case of the short haul than the other?

A. Yes, sir; an increase of cost of handling.

Q. Suppose the length of the haul is the same?

A. Then there would be practically no difference.

The Master: Your unit of estimate, whether of expense or of revenue, being the ton mile, the cost would be proportionately or relatively increased by bringing the two terminals nearer together?

A. Yes, sir.

Q. Because the ton mileage of the same number of tons would be lower?

A. Yes, sir.

(2) There are two terminal charges incident to the carriage of State freight, and only one in the case of interstate.

Daniel Willard testified (Record, Vol. I, pp. 515-16):

"A. If you will let me finish. Fifty per cent. of the whole business does not require the use or the existence of those facilities at all. One-half of the business which is left—I assume it is half, but I don't know how those proportions run, but of the business left, some of it, that which is purely local in the State, must be loaded and unloaded at those facilities. The other, which starts and comes in or starts out of the State and comes in, must use only a half of those facilities. And in comparing those I said it should be only as one to two.

* * * * * * * * *

A. I don't know as I do. I said the local facilities, this includes also the laborers who attend to it, the way bills and stationery and all the expenses incident to handling business. I have said that in my opinion it costs twice as much to handle business originating in the State of Missouri and ending in the State of Missouri, because the terminal and originating charge are both in the State,

and that it costs twice as much to handle as freight having only one terminal in Missouri."

And again (p. 518):

A. I cannot separate my conclusion that way, because as I say it necessitates twice as much to do the local as the interstate business; I have in mind that there are two terminal expenses on local business."

B. H. Bethard testified (Record, Vol. II, p. 1822):

"Q. Would you tell the master some of the elements that enter into the question of the extra cost, if there is any, of doing the State business over the interstate business?

A. First, there is in doing a strictly State business, the two terminals. Where you do a through business, originating and ending outside the State, there is no terminal charge. If the road is an intermediate road.

Where freight originates within the State and ends outside the State, there is one terminal charge."

And again (p. 1824):

"Q. You were basing your opinion as to the increased cost of the State business compared with the interstate business on the extra cost of operating local trains, and the extra terminal cost chargeable to the State freight business; is that correct?

A. Those are two of the items. The others are loss in train tonnage, and loss in equipment."

Mr. Doddridge said (Record, Vol. IV, pp. 3816-17):

"Q. What are some of the reasons and elements why in the State freight business it costs more than the interstate?

A. First, there is a fixed arbitrary train service, a local train service, upon which the great bulk of the State freight is carried. The next element that increases the cost of the State freight is the difference in the length of the haul, the short haul.

Q. That is to say, the State haul is ordinarily shorter than the interstate?

A. It averages very much shorter.

Q. Be a little more particular about wherein there is an extra cost on that account, and how that enters in as an element.

A. Each shipment of State freight has the expense of two terminals within the State; whereas the interstate freight can have but one terminal, and in some cases has none in the State.

Q. Give the court an illustration where the interstate freight has one terminal and where it has none.

A. A shipment from Indianapolis, Indiana, to Sedalia, Missouri, would have but one terminal expense in the State, and that would be at Sedalia. An interstate shipment passing through the State—

Q. Say from Indianapolis, Indiana, to Topeka, Kansas?

A. It would have no terminal cost at all in the State.

Q. Suppose the shipment was going from Sedalia to St. Louis?

A. Then it would have the expense of the terminal at Sedalia, and the expense of the terminal at St. Louis.

Q. Now, is or is not the terminal expense an extensive one?

A. It is as applied to a short haul. As the haul becomes contracted, the percentage of terminal expense as applied to the haul goes up.

Q. That is to say, the actual expense of the terminal is exactly the same, but if you can distribute it over the mileage, its average becomes less?

A. Yes, sir; that is wherein it creates an extra expense or cost."

Carl Gray said (Record, Vol. IV, pp. 3936-7):

"Q. All right; now you gave your opinion, I believe, yesterday, upon the extra cost of doing the State freight business over the interstate; will you please now give what, in your judgment, are some of the elements which exist, showing that

there is this increased cost. What goes to make up the increased cost—what elements?

A. There is a difference in the cost of handling the two classes of freight, primarily because of the fact that in the case of trans-state freight there is no terminal, in the strict sense of the term, in the State. And in the case of interstate freight, there is but one terminal.

In the case of State freight there are always two terminals."

W. M. Whitenton said (Record, Vol. IV, p. 4142):

"Q. What are some of the elements that enter into this matter of making the State freight expense greater than the interstate?

A. Well, you have the terminal expense, the two terminals, which is considerable of an item in the operating expenses.

Q. That is, the same situation as to the number of terminals exists with freight as with the passenger traffic?

A. Yes, you have the two terminals on your State business."

(3) There is much waste space in a freight car in local service; it is not filled to its capacity.

Howard Elliott testified (Record, Vol. I, pp. 427-8):

"Then, a freight car in local service cannot be used to its maximum efficiency. A car that will carry, we will say, forty tons of freight, or even thirty tons of freight, in local business it is a common thing to have it carry from one to five tons of freight. So you are not getting the full use of that particular part of the railroad company's property.

You do not get the full benefit of the capacity of the car by loading it in that way."

Mr. Willard said (Record, Vol. I, p. 525):

"But I will say the interstate costs less because for every ton of through freight you handle

fewer tons of dead freight than on the local. Or, conversely, for every ton of local you handle proportionately a greater number of pounds of dead freight, which all enters into it.

The Master:

Q. What do you mean by "dead freight?"

A. Perhaps I should not have used that term. Did I say dead freight? I mean the average weight of the car of through freight is much greater than the average weight of a car of local freight. Because the average weight of the local freight is less—by dead freight I mean the weight of the car on the tracks. If a car weighs 40 tons and in one car you have ten tons and in the other 40 to 60 tons, the percentage of dead weight is greater in the one than in the other."

Geo. B. Harris said (Record, Vol. I, p. 538):

"A. Well, a considerable part, or a part of the business which is expensive, is that consisting of merchandise, for which a very large number of cars must be employed and hauled, and in which it is possible to place only a very small percentage of their capacity. Those cars will carry, in my opinion, from two to seven tons, when their fair carrying capacity is forty tons or more."

Mr. Doddridge said (Record, Vol. II, p. 1588):

"Q. Take the less than carload local freight: Do you know anything about the average loading of that, what it amounts to per ton per car?

A. Yes, sir.

Q. What is that?

A. The average loading of less than carload freight, in my opinion, as a general proposition will not exceed four tons to the car.

Q. How much lost weight would that be in the car?

A. If the car weighed 16 tons it would be four pounds (tons?) of car to one ton of freight.

Q. That would be waste?

A. Absolute waste, because the cost of transportation is by the ton, all of the load, including the

weight of the car, the weight of the locomotive and the weight of the caboose."

And again (Record, Vol. IV, p. 3819):

"A. Yes, sir. In the use of equipment, the State service calls for many more cars to do a given amount of work as compared with the cars required, in handling the through interstate traffic. To be exact on that point, I will say that the investigation that I have made covering that figure shows (in the less than carload shipments) it requires from fifteen to twenty cars more than it does to do the through interstate business.

Mr. Lehmann: I do not quite make anything out of that. Do you mean fifteen to twenty per cent. more?

A. No, sir; I am talking about the less than carload State business. It requires the use of from fifteen to twenty cars to produce the same number of ton miles, that one car will produce in the through interstate business.

Q. I understand you.

A. It requires that many more cars. In other words, it requires the use of from fifteen to twenty cars to produce the same number of ton miles in the less than carload State business than it does to produce the same number of ton miles in the through interstate business, in one car. That is, one car will produce in ton miles fifteen or twenty to one.

Q. To produce the same number of ton miles in through interstate?

A. Through interstate, yes. I mean through business.

Mr. Evans:

Q. Interstate business?

A. I mean through interstate business; freight that is carried through the State.

Mr. Hagerman:

Q. By through interstate, do you mean something that starts outside the State and goes across the State without stopping?

A. Yes, sir; that is through interstate."

But Mr. McPherson differed widely from Mr. Doddridge on this point. In his opinion, eight cars instead of fifteen or twenty would be required.

He said (Record, Vol. IV, p. 4291):

> "The same would be true of the carload, but the experience of the Missouri Pacific, and I presume it is the experience of all other railroads, I don't see how it can be otherwise, is that, compared in the matter of tonnage, that the carload shipment may have 40 tons, or whatever the capacity of the car may be, and would require these two switching movements I speak of, while to secure the same equivalent of less carload freight would require the switching movement of 8 cars."

Mr. Bethard said (Record, Vol. II, pp. 1823-4):

> "Q. Explain what this waste tonnage is, and how that is an element or cuts any figure in this question of extra cost.
>
> A. In handling business within the State, as I stated a while ago, most of it is handled on the way freight trains, and the business goes, as a rule, to small places, and the cars are not loaded to their capacity. A great deal of it is merchandise, small freight, where your average carload is not more than three and a half tons to four tons per car.
>
> Q. Can you give some illustrations of the class of freight which would be carried where there would be a large amount of waste tonnage?
>
> A. Bulky, light freight, hats and millinery and things of that sort."

(4) Not as much use in 24 hours of a car in local service is obtained as of a car in through business.

Mr. Elliott said (Record, Vol. I, p. 428):

> "Then, when it comes to the movement of local business, on account of the short haul already

touched upon, you do not get as much use out of the car in the twenty-four hours. It goes fifty or sixty miles, has to stop and be set out and be unloaded. Whereas, in through business it may work steadily for several hundred miles or more."

Mr. Willard said (Record, Vol. I, p. 495):

"The way freight trains, which are run primarily for the handling of the local business, make fewer miles per day, run fewer miles per day, haul much lighter trains than is the case with trains handling through business, and on that account the cost of doing local business is greater than the cost of doing through business."

Mr. Harris said (Record, Vol. I, p. 539):

"Local trains do not make over about ten miles per hour. They cannot make it. The local train has more trouble in making ten miles per hour than the through train has in making from 17 to 22 miles per hour."

S. I. Rainey testified (Record, Vol. II, p. 1835):

"Q. Now, take some of the other items.

A. The extra cost of doing a particular business between given points, between certain hours.

Q. What do you mean by that?

A. The local trains must necessarily do their work as much as possible during the day time. The road is divided into what they call working divisions, about one hundred to one hundred and twenty-five miles distance. That is supposed to be as much as one crew of men can handle in ten or twelve hours. They are termed local crews."

Henry Miller said (Record, Vol. III, p. 2829):

"The way freight uses more time. They are usually scheduled at about half the rate of speed the through freights are."

And again (p. 2861):

"The local trains having to do the switching, loading and unloading of freight at stations make a great deal of overtime, something which seldom occurs to a through train."

Mr. McPherson said (Record, Vol. IV, p. 4298):

"There is another element that enters into this consideration, or aids me in reaching my conclusion, and that is the fact that the miles that the local crews are required to run are less than the miles of the through crews, ranging from 63 to 90, in local service, as against 100 miles in through service. We have two trains that differ from that; they are longer and the men are paid for all excess beyond 100 miles. I am talking now of general local trains. The local crews are paid for 100 miles; that is the basis, but the traffic is moved only 63 to 90 miles, instead of 100 miles. There is not, therefore, the same average efficiency of engines. Putting them in the average performance of engines, without any other considerations, the average mileage will be less than the average mileage of the through trains."

And again (Record, Vol. IV, p. 4299):

"There is a further loss of car efficiency in this, that those local cars going over the road from one district to another, in daylight only, perform less average miles per day than the cars that move day and night in through trains. That loss is considerable. It cannot be expressed in figures; nevertheless, to my mind, it has been a factor in establishing the greater cost of handling State traffic over interstate."

(5) The local train contains fewer cars; therefore, there is a loss of engine efficiency.

Mr. Elliott testified (Record, Vol. I, p. 428):

"Another element is the fact that the so-called 'local' or 'way freight train' can not be loaded to its full capacity. You have to run the local train on main line and on branches, both, much of the time with a lesser number of freight cars back of the engine than the engine is capable of hauling. On a light branch, you may see a way freight train with three or four cars in it, when the engine could easily handle thirty cars, but the business has to be moved, and you have to have your engine and all of your train crew to handle this small number of cars, whereas on the through business you get the maximum efficiency of your engine and train crew every time you move them."

Mr. Willard said (Record, Vol. I, p. 495):

"Q. Which is the heavier loaded, the local freight trains or the through trains?

A. In the State of Missouri the way freight trains handle less than one-half the tonnage that is handled by the through freight trains.

Q. And it is practically as expensive to handle a train half loaded as it would be to handle a train loaded to its full capacity?

A. More in this instance, on account of the extra switching done, and there is no saving in coal at all, and the higher rate of wages paid to train men on those trains."

Mr. Harris said (Record, Vol. I, p. 539):

"Your local train carries only from thirty to forty per cent. of the tonnage of the through trains. It cannot carry any more."

Mr. Clark said (Record, Vol. II, p. 1634):

"The way freight train never has full capacity over the entire run it makes, but always leaves its initial point light, to pick up other cars, or, if it starts out with a full tonnage it sets out some cars, and the company loses the full tonnage of this engine the full distance of its run."

Mr. Bethard said (Record, Vol. II, p. 1822):

"In handling the purely State business, you are handling it in trains that you cannot load down to the full engine efficiency, neither can you get your full carload, like you can on through business; for the reason that there is not the large towns in sufficient number in any one state to load your trains and cars fully, and the trains doing the State business are handling the State business and distributing cars from one station to another."

Mr. Miller said (Record, Vol. III, p. 2829):

"A. The State business is handled very largely on what are known as local trains. The local trains run whether there is any business or not. They invariably run light. I mean by that, they do not haul the capacity of the engine. A large part of the equipment in those trains is light loaded."

Mr. Whitenton said (Record, Vol. IV, p. 4143):

"You do not get the efficiency of your power in the way of tonnage, because it is of a distributive nature. You are setting out and picking up tonnage all the while, and you lose a great deal of your efficiency of your power. The movement on that account is slow. The miles for your train handling the State business, as a general proposition, the engine miles will only run about 70 miles, while the through freight will run 125 miles. And you will not handle more than on an average 60% of the capacity of the locomotive."

Mr. Gray said (Record, Vol. III, p. 3939):

"The fact that the one character of freight enforces a regular train movement, regardless of its volume, because the efficiency of the locomotive is rarely reached."

(6) The wages of the train crew are larger on local than on through trains, and the consumption of fuel is greater.

Mr. Elliott said (Record, Vol. I, p. 428):

"Q. Mr. Elliott, what is the increase of cost, if any, in operating the local train compared with the through train—I mean, as to the expense of the men in charge of the train? Have you had occasion to look into that?

A. I could not give you the exact figures now as to the relative wages. But in a general way the way freight wages are higher than the through freight wages. And there is very often more overtime on way freight trains, because of the loading and unloading at the local station, and the train being a long time on the road."

And again (p. 473):

"A. The local wages are higher than the through wages.

Q. Why is that?

A. It is harder work. On the local trains they have to load and unload freight at the local stations. And they have longer hours. The local freight cannot get over the road as quickly as the through freight trains."

Mr. Willard said (Record, Vol. I, p. 495):

"The men who run the engine and trains on local business get higher wages proportionately than the men on through business, and that adds to the price."

Mr. Harris said (Record, Vol. I, p. 539):

"The local train pays about 25 per cent., or more, in wages for the same mileage and the same service as the through train does, perhaps 20 or 25 per cent., or about that."

Mr. Clark said (Record, Vol. II, p. 1635):

"The company pays a higher rate to the engineer, fireman, conductor and brakeman on the

way freight than on the through freight train. And there is one more brakeman on the way freight than on the through freight."

Mr. Rainey said (Record, Vol. II, p. 1836):

"They (the local crews) are paid higher wages than the through crews. One extra man is given to this crew to help do the work."

Mr. Henry Miller said (Record, Vol. III, p. 2829):

"The wages of the men engaged on those trains are higher, and there is generally one more man on each of those trains. All of that adds to the cost."

Mr. Gray said (Record, Vol. IV, p. 3939):

"Because a greater rate of wages is paid the men on local trains than the men in through trains."

Mr. Whitenton said (Record, Vol. IV, p. 4143):

"A. One of the other large items of extra cost is your train haul, the wage of your train crew. Your State freight is largely handled by the local trains. The wage of the local freight is from 40¢ to 50¢ higher than the through."

Mr. Gray said (Record, Vol. IV, p. 3937):

"Because of the greater consumption of fuel."

James Peabody's testimony (Record, Vol. IV, pp. 4405-6):

"Q. What is the result as to the statement for July and August, 1908?

A. The cost of trainmen on the local trains for July was $1,293.25.

Q. As against what for through trainmen?

A. $6,374.92.

Q. In other words, the train men alone of the local trains and of the through trains, the wages, were $1,293.25 and $6,374.92?

A. Yes.

Q. And for August it was what?

A. For August the trainmen on the local trains were $1,418,34 and the enginemen $1,085.36.

Q. As against what for the through trains?

A. On the through trains the men were $6,-969.00, and the enginemen $6,135.16.

Without going into the details of that statement, what is the total for train men, engine men coal: for July the local was what?

A. $3,775.28, as against $21,092.13.

Q. And what was it in August?

A. For the local, $4,045.46, and for the through $24,805.24.

Q. That is the gross cost of those three items for the local and through trains, regardless of the number of trains that were run?

A. Yes, sir."

(7) Liability of injury to trainmen and to other persons at stations is greater in the case of way trains.

Mr. Willard said (Record, Vol. I, p. 495):

"The liability to injury of trainmen is greater on the way freights than it is on through freights, because of the increased amount of switching done at stations."

Mr. Gray said (Record, Vol. IV, p. 3939):

"Because of the greater hazard which accompanies necessarily the operation of a local train as contrasted with the through train."

Mr. Stuart said (Record, Vol. I, p. 701):

"Q. I believe you have touched upon, and if you haven't, I would like to have you give your judgment as to that, as to the liability to personal injury and wreckage doing more in the local or way business than in the through service?

A. A very small percentage of accidents on a railroad to equipment—I mean in the operation—

result during a time when a train is moving, freight cars particularly. The greatest damage to freight equipment is occasioned in yards, in breaking up trains, switching the cars, etc.; that is when the greatest damage occurs, and the greatest injury to employes is occasioned in yards, in the switching of cars, making up and breaking up trains."

Mr. Clark said (Record, Vol. II, p. 1636):

"There are more people hurt at stations by the local trains than the through trains."

(8) The tracks and other facilities which are used entirely for local business are expensive. The road was originally intended for local business, and therefore the maintenance of facilities originally provided for the accommodation of local traffic should now be charged to that traffic.

Mr. Willard testified (Record, Vol. I, pp. 494-5):

"Q. Mr. Willard, have your duties as vice-president of the system been such as to enable you to give an opinion on the relative cost of this business, this State and interstate business?

A. I rather think so. I have an opinion, at any rate.

Q. Will you please state whether it costs more to do the local business, and if so, how much more?

A. In my opinion the cost of doing the local business, as you have described it, would be none less than three times as much as the doing of the other business you have mentioned, and it probably would be more than that. I do not hesitate to say that in my opinion it is not less than three times.

Q. Give some or all of the reasons upon which you base that opinion.

A. With special reference to the State of Missouri, I think this is true: The Burlington railroad in that state was clearly originally intended for local business. There was no through business pass-

ing from outside the State to points through the State, in any great quantities, when it was built. The road as it is now built was primarily built to take care of local business, and the facilities built originally, and which are in use now, are practically all necessary for the performance of this local business, even if there were no through business. The side tracks in the State of Missouri which are used wholly for business from one point to another in the State, or from a point in the State to some point out—those facilities, side tracks and buildings, which are provided for local business in the State from one point to another and which are used by business going outside the State, but not business passing through the State, constitute approximately 26 per cent. of our business (mileage?) in Missouri; and the cost of maintenance should be charged wholly to the carrying on of the local business.

The expense for agents, freight houses, freight house handlers, is largely increased because of the local business which is done over what would be required if simply a through business was being handled, because of the nature of the business and the character of the service necessary to perform it."

And again (p. 521):

"Q. Where did you get the figure that 26 per cent. of the entire mileage of the Burlington system in Missouri is necessary for the doing of what you call local freight business?

A. I do not get that idea at all. Because the percentage of local freight mileage in Missouri is very much in excess of that.

Q. What did you mean by that 26 per cent. of trackage?

A. What I said was this: that 26 per cent. of the miles of railroad in Missouri was made up of tracks required for the handling of either local business or that portion of the interstate business which starts or stops in Missouri as distinguished from passing tracks and main tracks used simply for the passing of trains. That is what I had in mind."

And again (pp. 521-2):

"Q. But you would not say that through shipments passing through the State of Missouri would not use sidetracks?

A. No, sir; I have not said that. In addition to that 294 miles, I think it is, of tracks used for business purposes, and which constitutes 26 per cent. of our entire mileage, there are also about eighty miles of passing tracks. They are used by the through trains. I have not included that in this answer at all.

Q. By the 26 per cent. of the trackage being necessary for the doing of the local business, as you have characterized it, as distinguished from interstate freight passing through the State of Missouri entirely, those are what you call commercial tracks?

A. Yes, sir. The Burlington, of all the tracks which it has in the State of Missouri, 33 per cent. are side tracks. Of that 33 per cent., 7 per cent. are passing tracks, and 26 per cent., approximately, are for business purposes. That is not exactly correct, but only approximately so."

W. C. Stith, Freight Traffic Manager of the Missouri Pacific and St. Louis, Iron Mountain and Southern Railways, testified, on his direct examination (Record, Vol. II, pp. 1492-3):

"Q. And you understand, I suppose, necessarily, the relative cost of handling local and through freight?

A. I understand that in a general way, yes, sir.

Q. I mean in the preparation of your rate sheets?

A. Oh, yes.

Q. I should think you would consider that question. Do you?

A. To some extent, yes.

Q. Are you prepared to express an opinion as to whether it costs more to handle what you call State freight, that is, freight originating in the State and destined to another point in the State,

without passing out of the State, as compared with freight that passes through, or freight that has its origin and destination outside; or its origin outside and its destination in the State?

A. I have a general idea about that, Mr. Clardy. I do not know that I could give you any definite figures. My impression of the matter and understanding has been the result of my connection with the business—I don't know that I have any detailed figures to submit—but it has always been my idea about it, that the cost of doing the purely local business was very substantially greater than the cost of doing through business. And it has always seemed to me that that cost would be up to fully two and one-half times as much.

You take the handling of a local shipment between two points in Missouri: You are required by your charter to inaugurate and continue certain train service. These trains have to run, and the necessary supervision in the way of officers, necessary trainmen to handle the trains, telegraph service, and everything of that kind, has to be provided to insure the movement of such trains over the rails. It might require and undoubtedly would require some augmentation of some part of that service to do at the same time the interstate business. But you are required to provide station facilities, passing tracks, delivery tracks, for your local business, regardless of whether you do any through business or not. And it has always seemed to me, and I have heard it discussed many times, that the cost of doing your local business was very substantially greater than the cost of doing your through business.

If we had a train loaded out of St. Louis proper, for Sedalia proper, and there was room enough in one of those cars to take an interstate box that was going to some point in Kansas, and it took it that far on its way, it would be almost impossible to figure out how much the railroad company would have saved in the transportation of that particular lot of freight, if it had not carried that one particular interstate shipment. And that saving would really represent the cost to the railroad company of the transportation of that one shipment."

And again, on cross-examination (Record, Vol. II, pp. 1517-19):

"Q. What would be the main items in the figures of the cost of local traffic as compared with through traffic?

A. Giving my own personal views in the matter, in handling your intrastate traffic you are compelled by your charter to provide certain train service. You are compelled, of course, to provide the necessary station service, tracks, and the labor that is necessitated to operate your trains, to handle that local service. That you are compelled to maintain to a certain extent if you did not have any through traffic at all.

Q. You would be compelled to maintain it if you did not have any State traffic?

A. No, sir; you would not have any railroad if we did not have any State traffic, and, consequently, would not have any expense.

Q. You say you would not have to maintain any of these things you have mentioned?

A. As a primary proposition I would consider that your State business is the basis for your having a railroad. The fact that you handle interstate business over that State railroad is secondary and not primary. In other words, if you take out a Missouri charter for a Missouri railroad between two Missouri points, you must equip your line first to do that local business.

The Master: Is not that question wholly an academical one? The railroad is established and is doing both classes of business and is run for the purpose of doing both classes of business. Isn't it more proper to inquire into the question of the proper expense of doing those two classes of business, than to attempt to discuss the merely academical question that one is primary and the other is secondary? What profit is there in a discussion of this sort?

Mr. Ladd: The railroads in this State are just as much bound to deliver interstate freight at Warrensburg as any other place, by law.

The Master: The object of this investigation

is, if possible, to separate both the revenues and the expenses and adjust them relatively to each other. That is the primary object of this investigation. I do not see much profit in a discussion of this sort.

Mr. Kennish:

Q. Would not that depend a good deal on the relative amount of business done at those stations, whether State or interstate, as to which was responsible for the company's having to go to that expense to provide its conveniences for the traffic? Suppose the interstate business at any station far exceeded the State business at that station: Would you still say those conveniences to handle the traffic at that station were necessitated by reason of the State traffic?

I should say so promptly; yes, sir.

Q. Take it in the matter of live stock, you referred to that extensively yesterday: I suppose your railroad has its conveniences for the loading and unloading of live stock at every station of any importance in the State of Missouri. Is that correct?

A. Yes, sir; that is correct.

Q. Live stock is shipped mainly to the markets at Kansas City and East St. Louis on your line?

A. Well, that is true; but when those facilities were originally established the movement was largely within the State.

Q. When they were originally established?

A. Yes, sir.

Q. What difference does that make? You have them now and you use them now?

A. Yes, sir; that is true.

Q. And you use them for interstate business; do you mean to say the company is put to the expense of establishing and maintaining them because of State traffic?

A. I realize that live stock that moves from stations on the Missouri Pacific to the National Stock Yards at East St. Louis is interstate business. I realize that stock that moves from Missouri stations to the stock yards at Kansas City may be interstate business. But the conditions are con-

trolled entirely by the State considerations. That is, as to rates and as to service. And originally the deliveries were made within the confines of the State.

Q. Would that make any difference if it was in fact interstate business?

A. If you are referring to providing certain facilities for doing your State business, which you are, it seems to me it would be fair to say that the State business would be chargeable with the preponderance of the cost; because the extra or outside business you do through those same facilities is incidental.

Q. Yes, but if the outside business, as in the case I have mentioned, is far in excess of the State business, why do you say the State business can be chargeable with that expense, instead of the interstate business, which does a far larger business?

A. You have singled out live stock, which is a peculiar trade. So far as employes—the station agent, is concerned, for instance, he must be employed whether we do any interstate business or not. The telegraph operator, who takes and issues train orders, must be employed if we do not do any interstate business. Your terminal stations at St. Louis or Kansas City, or Sedalia, have got to be provided, to a greater or less expense, if you did not do any interstate business to or from those points.

Mr. Ladd:

Q. And just so if you did not do any State business?

A. I do not view it that way. There is not any charter requirements as to that, as I understand it.

Mr. Kennish:

"Q. Assuming the facts would show that your road in Missouri did an interstate business of about 86 per cent. of its entire freight business, and that about 30 per cent. of that was what we term "through interstate" business, that is, freight that would pass entirely across the State, leaving about 50 per cent. of interstate freight that would originate or terminate at stations in Missouri, as com-

pared with about fourteen per cent. of intrastate freight: Would you say under those facts that the expense the company was required to go to in providing stations, telegraph service, and such costs as you mentioned, was wholly on account of State traffic and not interstate?

A. Why, I think, of course, the volume of interstate business would be influential in a matter of that kind.

Q. The volume of the interstate business done at those stations—

A. But it need not be to such an extent, in my judgment, as to control the expenditures to the extent that you might so charge the bulk or greater part of the cost of those facilities, and the operation of that line, to the interstate business.

Q. It ought to control to the extent of charging the expense to the proportion of each kind of freight done at that station, shouldn't it?

A. I don't think so.

Q. You think State freight ought to bear a larger proportion of the expense relative to the amount of business done at the station than interstate?

A. Undoubtedly.

Q. Notwithstanding the service rendered on the interstate business would be just as much or more as the service on the State business?

A. I do not view the services in that light, but I think a much greater charge should be made relatively against the State than would be made against interstate business.

Q. Why?

A. For the reasons I have stated.

Q. *For the reason that the road was first built to do State business,* and that the road would have to have these officers even if it did not do any interstate business?

A. *Yes, sir; that is my opinion about it.*"

Mr. Miller, General Manager of the Wabash Railroad Company, testified (Record, Vol. III, p. 2861):

"A. You have to maintain for the local trains

all the things you have to maintain for the through trains, and in addition you have the sidings for local business, including elevated tracks, stock yards, warehouse facilities and the labor cost."

And again (pp. 2862-3):

"Q. But there is more or less interstate business at all these stations, isn't there, Mr. Miller? People receiving freight from outside the State and people shipping freight to points outside the State, at every one of your stations?

A. *That is true today. But take the railroad when it was built, what was it built for?*

Q. How is the merchant, for instance, at one of these little stations you say you would abandon, going to get a box of goods from Chicago?

A. How did he originate is the question.

Q. How would he get a box of goods from Chicago, unless you would maintain those sidings that you say are intended for the local business?

A. We would unload the box on the ground.

Q. On the ground?

A. That is done now at places where there is not sufficient business to maintain a station.

Q. Suppose he wanted a carload of goods?

A. That is altogether unlikely. At a station where there was not enough business to warrant a side track for the local business, there would not be any carload interstate freight.

Q. I will have to ask you how many stations there are in this State which, if you abandoned your local business, you would not keep up your sidings. We have spoken of sidings in a general way. We are to understand from your testimony that if it was not for your local business you would not have anything but main lines and passing tracks in this State?

A. I do not think I have said anything that could be construed in that light.

Q. I understood you that these side tracks were built and maintained for the purpose of the local business and would not be used by the through business at all.

A. *They were built when the railroad was first built. There was not any through business. It was built as a local railroad within the State.*

Q. If you had your way you would make the Wabash a through line and would not have any local business in the State?

Objected to by counsel for complainant.

The Master: I think that is legitimate cross-examination.

Mr. Minnis: The witness has not asserted he should have his way. I think this is objectionable and really uncalled for, to say to a witness: 'If you had your way you would assert a disposition to change the order of things,' and I do not think it is justified.

The Master: I do not think it should be construed in any such way. But I will suggest to counsel that in the pressure and enthusiasm of cross-examination you occasionally, unintentionally, of course, do not give the witness time to complete what he is about to say. I know that it is unintentional.

Mr. Ladd: I have not intended to interrupt him.

Q. When you were asked about the items that went to make up extra expense of handling the State business, you spoke about the construction and maintenance of sidings, which you said, as I recollect, would not be used for the purposes of through business at all. Now, I ask you, if those same sidings are not used for the interstate business, every one of them?

A. *They happen to be, now. But they were constructed for the local business, very largely. And a great many of them, before the road had any through business, and before it was a through line.*"

And again (p. 2896):

"Q. You referred, for instance, to the elevator tracks. That would be made necessary for the unloading and loading of grain. Now, if grain shipped from that elevator was an interstate ship-

ment, that cost would be as much assignable to interstate traffic as to State traffic?

A. Yes, sir; *but the purpose of the elevator is for the State business*—

Q. Mr. Miller—

A. *This railroad was built before it had any interstate business, and these things grew up and were used for the purpose of the local business in the State.* Now, incidentally they do handle interstate business."

And again (pp. 2901-2):

Mr. Minnis:

"Q. What class of business requires the running of these State trains you have mentioned?

A. The State business.

Q. State business requires it?

A. Yes, sir.

Q. So that the circumstance that you might carry a few boxes of soap on one of these trains would not be a very important factor, would it?

A. There would not be very many of those trains on that schedule (indicating) to handle interstate business locally for Missouri.

Q. The business would be handled differently if it were not for the local business?

A. Yes, sir."

Mr. Gray said (Record, Vol. IV, p. 3939):

"Because of the provision as well as the maintenance of facilities which are not required by the trans-state business, and which are only partially required by the interstate business."

And again (p. 3951):

"A. The point is that in building this house you must begin at the foundation, and the foundation is that we have to meet certain lawful, and it would not behoove me to say other than proper requirements. Those requirements are that we shall furnish certain facilities. We shall furnish this character or that character of facilities. That we shall furnish this character or that character of train service.

These are not brought about or forced upon us by any authority other than that exercised by the State.

Now, when we have got these things, and when we have got these stations, we will say, and have got these side tracks put in for this, that or the other local conditions, we have got this train running. Why, then that local traffic is a desirable feature."

And again (pp. 3952-3):

"Q. So that the elements of expense which would be distinctively occasioned by any one class of traffic as distinguished from another class is small. That which is absolutely distinctive?

A. No, sir; I could not admit that.

Q. Why not?

A. *The reason is that I cannot, in considering the subject, divest myself of what I know to be the controlling reason for these conditions I have mentioned to you.* It gets right back to the foundation of the thing. *We put on this particular character of service because it is required by the State.*

Now, having that service on there, which serves the State purposes, I am going to seek, I mean collectively, the men who are handling the details, are going to seek, with this known condition, to make the burden of that condition as light as possible. But the condition itself has been brought about by that. That is why I cannot answer the question, as I believe you would like me to do."

And again (pp. 3978-9):

"A. I have put that interstate freight on there because of a condition I have already given. I don't want to lose sight of the fact I am endeavoring to help out a condition that I already have.

Q. Now, you would not put the interstate freight on the local train if it was not for this local condition created by the law, you mean?

A. If I didn't have the local train there I wouldn't put it on.

Q. No, but, Mr. Gray, how can you put the interstate traffic on your trans-state trains?

A. I haven't got any such thing. I have got all those kinds of trains, and I have all those kinds of traffic on all of them.

Q. Now, you couldn't have this traffic at all if you didn't have your local trains, could you? Your local trains pick up, your way train picks up State and interstate traffic at different points along the road, particularly, of course, your branches, which have nothing but local trains. They pick up all of the traffic, State and interstate, and they carry it to condensing points, if you reach a condensing point before you reach a destination point?

A. Yes, sir.

Q. And then you make through freight out of it at the condensing points?

A. Yes, sir.

Q. Now, isn't your local or way train just as essential to interstate traffic as it is to State traffic?

A. No, it is the character of the work that that train is required to do for the localities which, of course—I understand I am not overlooking the fact that that train is handling interstate freight, and it is essentially there for the benefit of the local public that it serves. And it could be run in the night, or it could be run any other time if it was not for the local necessity at those—each individual station.

Q. I understand; but, Mr. Gray, those local necessities relate to people who are citizens or residents not alone of the State of Missouri, but of the United States, and they have their commercial relations and their industrial relations and not bounded by State lines, and I think you stated the fact is shown by your reports, that you do more interstate business on those local trains than you do State business. Now, unless you cut those communities entirely off of railroad facilities, how can you say that the State traffic in itself imposes the obligation upon you to run those way trains?

A. Well, I will try and explain it. I will very likely experience some difficulty in doing it. But

I start with this principle: that this community has got to be served.

Q. Yes.

A. Today, and it may be all State business that that community will do.

Q. Yes.

A. And tomorrow it may be all State business, and the next day—it would be a violent supposition, it might be all interstate business. But the fact remains that that community depends upon that particular local train for its merchandise. It may be that sometimes a little community cannot go to work in the morning until that local train gets there and fixes them up so they can go to work. So that it may be a condition that it is fair to say is due purely to State traffic; it may be a condition that you are willing to say is a moral responsibility that that carrier has assumed. But the fact is, we start every day, we are running that train in that particular way and in daylight for that community, and that community is in a sense dependent on it. It is a local condition."

And again (p. 4030):

"Q. If, however, it should appear to be true that the major part of that traffic, and I believe you have agreed with me that the major part of that traffic is interstate, how can you say you run that train primarily for the benefit of the State traffic? Why don't you run it primarily for the benefit of the greater portion of the traffic?

A. You mean this local train?

Q. Yes.

A. I have tried to make that clear. Perhaps I will not succeed any better now.

The deduction I have drawn is this: That that local train which performs a peculiar function besides hauling freight, and these functions are brought about by serving these localities. It has all these functions, it handles freight, it does switching, it is a convenience, and my conclusion is that it is more due to State than to interstate.

Now, carrying that a little further on the lines I have enumerated, those run because of State

traffic, and I have attempted to make clear that I would not run them at all if it was not for the State traffic, to the extent it is run.

Now, if I handle in that train interstate and trans-state freight, it is because I have got it, and it is going, and it is going in spite of these conditions, rather than on account of them."

And again (p. 4031):

"Q. As I understand your view, *you treat those local runs as chargeable primarily to State traffic*, and you think you ought to charge the State traffic from six to ten times as much per ton mile for the cost of the movement as you would for the interstate handled on those same trains, *notwithstanding the interstate constitutes a majority of the freight?*

A. *Yes, sir; that is my deduction.*"

And again (p. 4034):

"Q. When it comes down to the actual, apportionable cost of a local train, which has ten stations from where it starts out and where it ends, and it plies between those ten stations, all way stations, and the same kind of country, so far as the actual, apportionable cost is concerned, isn't it exactly the same as to any commodity of the same kind? Your train must be made up for one package as for another. The men have to be paid as much on account of one as for the other. You cannot apportion the expense at all, and the only thing you can apportion is the benefit received by the patrons of the road. It all harks back to the same thing."

The question and the answer seem run in together; but the question evidently ended as above, and the answer to it proceeded, as follows:

"I cannot consider that I am going to run that train for the benefit of all that; the other is inci-

dental. *My theory and my figures are based upon the fact that the local train is the creation of a State condition.*"

(9) Labor at local stations is employed constantly and used occasionally.

Harris' testimony (Record, Vol. I, p. 538):

(10) The haul of any empty car for loading at a local station is sometimes long for the purposes of a shipment for a short distance.

Mr. Harris testified (Record, Vol. I, p. 539):

"A. Yes. You take, say a carload of freight, at a local station to go a short distance. When the business is there the agent will order a car for it. Now, of course, it is a difficult question, for a company having several hundred stations, to have cars at all times at all stations, because there are a great many of these smaller stations that use only a very few. Of course, the car is brought from the nearest by point, but they very frequently have to be hauled for long distances, and frequently they are hauled from the large terminals, where empties are constantly made, the cars being unloaded there. So it is very frequently the case that the haul of the car for a short local way haul will be actually as great, empty and loaded haul combined, as a long interstate shipment. That is one of the expenses necessarily incident to that class of business, and which cannot be avoided."

(11) The wear and tear of the equipment of a way train is greater.

Mr. Harris said (Record, Vol. I, p. 539):

"Now take car repairs: they are an important part of the expenses of a railroad, and car repairs being based on mileage, or largely influenced by mileage, this long empty haul that seems to be almost necessarily connected with a large part of the local business, makes the car repairs high in proportion to the short way haul that they get."

Mr. Clark said (Record, Vol. II, p. 1636):

"A. I will add, that these local trains stop at almost every station. It is in the way of other trains. The switching becomes expensive. There is more wear and tear to the engine doing the work. They damage a good many more cars than through trains, in pulling out draw heads and bars."

Mr. Gray said (Record, Vol. IV, p. 3937):

"Because of the increased repairs to all character of equipment, and of permanent way."

Mr. Whitenton said (Record, Vol. IV, p. 4143):

"Not only that, but the frequent stops and starts of the train damages the equipment.

The cost of car repair incident to the class of traffic is necessarily higher than it would be on a train that moves right along and does not make frequent stops."

(12) Local trains must run whether there is business not.

Mr. Miller testified (Record, Vol. III, p. 2829):

"On the branch lines the trains run on their schedule whether there is any business to go or not. That is true of the local trains generally, that you go anticipating there is going to be freight at the various stations, and there generally is, but not invariably. Sometimes, in bad weather particularly,

they go over the road without earning anything to speak of. That is also true of trains picking up stock and local business. A train may leave Moberly and pick up a car of stock for St. Louis, absolutely light. Say there are thirty or more cars of stock to be taken and finally land at St. Louis with a full train, and yet they go over half way over the road with practically nothing. Their through trains are not started unless they have a load for them, and they generally maintain their whole tonnage."

Mr. Gray said (Record, Vol. IV, p. 3937):

"The fact that the one character of freight enforces a regular train movement, regardless of its volume, because the efficiency of the locomotive is rarely reached."

Mr. McPherson said (Record, Vol. IV, pp. 4296-7):

"The broad distinction between the transportation conditions governing the local traffic and the through traffic is this, that the train movement of the through traffic is regulated by the traffic that is to be moved. In other words, in through traffic only a sufficient number of trains will be run to move that traffic under ordinary conditions, and the potentiality of the power used in moving that traffic will under ordinary conditions be substantially realized.

The number of trains on the contrary in local traffic, in local service, is an established fact. It is a part of the general establishment of the railway. It is a part of what we call a fixed charge of operation we cannot escape; that is, we know it is certain. We can always figure that we have got to stand it.

Mr. Clardy:

Q. It moves regardless of the tonnage?

A. Yes, these local trains must be moved regardless of the tonnage. If it has but one car, the train must move, or if it has a half dozen, or any number less than its potentiality, as determined by the officials of the railway, as an index of the efficiency to be expected from that engine.

As a result of this general distinction, through traffic and trans-state traffic, and in some cases car load State traffic, is moved efficiently; that is to say, the potentiality of men and power in through trains is reached, while in local service it is never the case. This condition cannot be imagined on a railway. In years of experience, I have never seen the conditions exist where the potentiality of the power could be realized in local traffic."

(13) The local business is rehandled more or less; at unimportant stations less than car load business in the warehouse and car load business in the yards.

Testimony of Henry Miller (Record, Vol. III, p. 2861):

"Q. What is that, Mr. Miller?

A. You have to maintain for the local trains all the things you have to maintain for the through trains, and in addition you have the sidings for local business, including elevated tracks, stock yards, warehouse facilities and the labor cost.

Q. What do you mean by "labor cost?"

A. Whatever freight handling you have, and clerical force.

Q. Aren't your freight handlers included in your station men?

A. Yes, sir.

Q. That is included?

A. Yes, sir.

Q. What else?

A. A locomotive is practically used on a local train going over one division, twenty-four hours. On the through trains that same engine can easily make a round trip. The local train hauls about 1/3 of the capacity of the engine, and the through train, as a rule, is loaded to the full capacity. The local trains having to do the switching, loading and unloading of freight at stations, make a great deal of overtime, something which seldom occurs to a through train. One hour's overtime on a train

means an increase of ten per cent. in the wages. It is not infrequent that they get in two, three or four hours overtime on those trains. In picking up stock, the shipper sometimes has not his shipment at the station; it is on the way, or he has just arrived, and the train has to wait. All those things get into the cost. It is necessary to maintain more water stations for the trains doing local work than it is for the through trains. The local trains use more coal, too. And supplies of every kind. The local business is rehandled more or less; at unimportant stations, less than car load business in the warehouse and car load business in the yard; all of which adds to the cost."

(14) Way freight trains carry passengers who are greatly exposed to injury upon them, entailing an additional expense.

Mr. Doddridge said (Record, Vol. IV, pp. 3820-1):

"Another item of additional expense in the operation of the local trains on some of the lines is where it is used for the carrying of passengers, and thereby becomes what is known in railroad language as a "mixed train." In the state of Arkansas, all local trains are required to carry passengers.

Q. That is, local freight trains?

A. Yes, sir; and some of them do carry passengers in Missouri, but whether that is the law of the State, I am not informed. But where that condition exists, it creates quite a large additional cost.

Q. That pretty generally exists, doesn't it, upon those local trains?

A. It does upon certain of the branch lines where there is no straight passenger service, or where there is only one regular passenger train per day. In that case, to accommodate the public, the local train is permitted to carry passengers, and is run as a mixed train.

Mr. Evans:

Q. Local freight train?

A. Yes, sir; local freight train. And in that case it is, if the train is properly run, which it probably is in the State of Missouri, if the train has any stops for the stations, the first stop it makes is at the depot platform to let the passengers off. Then it is the custom for the local crew to go on and do their local work, their switching. Then if they are detained fifteen to twenty minutes, as they frequently are, they have to make a second stop at the depot platform to take on any passengers that may be there and want to use the train.

The effect of that in some parts of the country is very risky to the passengers. It is a more dangerous kind of train for them to ride on. There are no precautions taken by the train crew, usually. While they are doing their work their minds are on something else and the passengers take care of themselves.

And my experience has been that a great many accidents resulting in personal injuries have occurred on that account."

At this point, it is natural to observe that if the company chooses to carry passengers on freight trains, injury to them should be charged to the passenger service.

(15) The casualty claims for injury to State freight are larger.

Mr. Whitenton testified (Record, Vol. IV, p. 4143):

"The casualty claims for handling State freight are greater. The frequent handling of it necessarily makes more claims, and in that portion of Missouri, that I am particularly acquainted with, the character of the freight handled is such that it is very expensive.

Q. What do you mean by that, the character?

A. It is largely live stock that we have to run a special service to accommodate.

Q. Why is that? Why is that a character of service where there is an increased cost over some other character of service?

A. You have to protect that and handle it. You have to run the trains regardless of any other tonnage. If you have only four, five or six cars, you have got a service established and you have got to protect it. Whether you have the tonnage or not, your expenses are there, and if the tonnage is not there to move, you have to take the four, five or six cars just the same as you would twelve or fifteen cars. It has to be moved.

Then, of course, the damage claims in stock is high, if it is not handled promptly and given efficient service.

Q. Does the frequency of the stops and interruptions of that character and kind have a tendency to increase or diminish the damage claims?

A. It has a very decided tendency to increase them. The stopping and starting of a train is always a great hazard of damage, especially with that character of freight."

(16) The expense of billing less than car load freight is much greater than that incident to car load freight.

Mr. McPherson testified (Record, Vol. IV, pp. 4290-1):

"I would like to digress a moment: less than carload freight does not necessarily mean that it is less than a car load. Less than car load freight may be a full car load of merchandise consigned to various parties at one point, or various parties at a number of stations. The less than car load freight is a package freight as distinguished from car load or commodity.

Q. There may be as many consignees as packages?

A. There may be as many as there are packages, and as many waybills as there are packages.

I believe I can illustrate that by actual test made at our freight house at St. Louis by Mr. T. P. Adams, our agent at that point, in response to my telegram when I was in Kansas City in November of this year at this hearing.

This test consisted of taking five cars per day of L. C. L. freight for five consecutive days—

The Court:

Q. L. C. L., you mean less than car load?

A. Less than car load, yes, sir. As explained, for five consecutive days, these cars were loaded at the freight—at St. Louis, destined to Missouri Pacific points in Missouri; that is, Missouri points on the Missouri Pacific railway, all local business.

On November 2nd, one car required the making of 29 waybills; another car the making of 12 waybills; a third car required 17 waybills; a fourth car 9 waybills, and the fifth car 15 waybills. For these five cars 82 waybills were necessary.

A waybill is the manifest or description of the property and its destination or ownership, and states its weight and what charges are to be collected. These waybills must also recapitulate every package of freight in the shipment; hence one waybill may have one to an indefinite number of separate descriptions, and while 82 waybills were employed in billing these cars, and that was the distinction between separate stations or consignees, the entries required may have been many times that; they may have been as many times 82 as there were packages consigned to each consignee.

On November 3rd one car had 9 waybills; one car, 15; one car, 13; one car, 5; one car, 9; a total of 51.

On November 4th one car had 17 waybills; one car, 8; one car, 11; one car, 9; one car, 14; a total of 59 waybills.

On November 5th one car had 14 waybills; one car, 13; two cars, 19; one car, 15; a total of 61 waybills.

On November 6th one car had 15 waybills; one car, 13; one car, 14; another, 12; another, 10; a total of 64 waybills.

This made a total for these 25 cars of 317 waybills.

Compare this with car load shipments, say a car of molasses, or a car load of sugar, or a car of lumber, coal, cement, which are consigned to one party as a general rule. The work falling upon the organization at St. Louis for these 25 cars was as 317 bears to 25; in other words, the billing entries that would have been made by the St. Louis station on car load shipments would have been 25 as against 317, for the less than car load freight.

Mr. Clardy:

Q. 25 on the car load?

A. 25 on the car load as to 317 on the less car loads.

Mr. Hagerman:

Q. More than six to one?

A. More than six to one. I am using this illustration to fortify my statement, and to show the reason for my conclusion that the cost of handling this traffic is several times that of interstate traffic.

There was something more to be done at the St. Louis station than the mere billing of these cars. There was the abstracting of and accounting for 317 waybills as against 25. There was the handling of these various packages, receiving them at the door of the freight house, weighing them, checking them, trucking them into the car; a multitude of steps that must be taken in the procedure of safely handling this traffic, and doing it in an orderly and secure way.

As to the relation of the handling of the car loads, the steps that would be taken would be the weighing of the cars each, as a unit; the billing of the cars; the abstracting of the waybills and other necessary station accounting."

(17) The wear of way is greater from way trains than from through.

Mr. Doddridge testified (Record, Vol. IV, p. 3820):

> "Of course, this local train in doing its station switching creates an item, quite a considerable item of expense in the wear and tear upon the switch tracks, frogs, and so forth, at the station, that are not ordinarily used or necessary for the through traffic passing over the road."

D.

THE COMPARISON MADE BY COMPLAINANT'S WITNESSES IS BETWEEN THE EXPENSE OF WAY TRAINS AND THAT OF THROUGH TRAINS; NOT BETWEEN THE EXPENSE OF STATE BUSINESS AND THAT OF INTERSTATE.

The issue tendered by the complainant is that it costs more to handle State than interstate freight. The evidence offered in support of that issue is that a *way freight* train is more expensive than a *through freight train*. The record is crowded with—indeed, it is devoted to the recital of details, important and unimportant, substantial and trivial, real and fanciful, nothing within the range of the imagination being omitted, to show that the *way train* is more expensive than the *through train*. The evidence so offered cannot be said to be irrelevant because it does bear upon the issue. But in and of itself it is not sufficient to maintain the issue tendered. Nevertheless, it was offered, and apparently accepted in the court below as abundantly adequate for that purpose. Hundreds of pages of this kind of evidence were introduced by the complainant as if it were decisive of the issue; just as if the real issue were (as it is not) between

"way train" and "through train," instead of being (as it is) between "State freight" and "interstate freight."

The success with which this confusion of issues, with which a studied substitution of an imaginary issue for the real one was attended in the court below, is one of the motives of this appeal; whose purpose is to correct a finding upon a false issue and a decree based upon that finding.

It is true, that skillful methods of examination were able, from time to time, for a moment to obscure the fact, but the record as a whole shows clearly and unmistakably that the dominant thought always first and foremost in the minds of the witnesses, and which they expressed over and over again, was the relative expense of the *way freight train* and the *through freight train*, and *not* that of State and interstate freight. For proof of the truth of this assertion, we appeal with unhesitating confidence to the record itself.

Mr. Elliott said (Record, Vol. I, p. 427):

"Q. Has your service with the company enabled you to observe the relative cost of doing *local* and *through* business on the Burlington road in Missouri?

A. Yes.

Q. Is there, in your opinion, any difference in the cost of handling *local* freight and the cost of handling *through* freight?

A. Yes.

Q. What, in your opinion, is the relative cost or expense of handling the two businesses?

A. I think it is rather difficult to say exactly. I should say anywhere from three to six or seven times greater for *local* business as compared with *through*, depending on the class of the branch and the amount of business on the branch."

And then the witness proceeds, in response to an inquiry (p. 427) as to the elements "which enter into the extra cost

of doing *local* business," to say: "Another element is the fact that the so-called *'local'* or *'way train'* cannot be loaded to its full capacity * * * whereas, on the *through* business you get the maximum efficiency of your engine and train crew every time you move them." (p. 428.)

Upon cross-examination he said (pp. 430-1):

"Q. Judge Spencer asked you if you were familiar with, or if your services had enabled you to express an opinion as to the comparative expense between doing *local* and *through* freight business?

A. Yes, sir.

Q. You so understood the question?

A. Yes, sir.

Q. What do you mean by "local" freight business, Mr. Elliott?

A. I should call *local* business business that was picked up at a place like Hannibal and *peddled out from one station to another* in the State of Missouri, *or moved on to a branch line.*

Q. Would you by that same term, and in your understanding of the question and the giving of the answer, also include such freight, for instance, as was taken from Des Moines, Iowa, and sent down on a branch line to Albany, Missouri?

A. Yes, sir; I should call that local business.

Q. Or such freight as was taken from Indianola, Iowa, and sent down to any point on either of those branches with which that connects. That would be local business according to your idea?

A. That would be my interpretation of it.

Q. And by *"through"* business you would mean business that was handled in what are known as *"through freight trains?"*

A. *Substantially that.*

Q. That is, by "through business" you would refer to shipments that would originate, say at Kansas City and end at Hannibal?

A. It might be going to New York.

* * * * * * * * *

Mr. Hadley:

Q. You would call, business originating in Kansas City and ending at Hannibal or St. Louis, *car-*

ried on a through freight train, "through freight business?"

A. Yes, sir.

Q. *And your testimony was given upon a comparison of the expenses of handling the two classes of business that you have indicated you meant, in answer to my question?*

A. *Yes, sir.*"

And again (p. 439):

"Q. Your answer, as I took it down—and I tried to take it down exactly—was that the additional expense for handling *local* as compared with *through* business was from three to six times as much?

A. Yes, sir.

Q. That you have already explained was a comparison of *local* freight business with *through* freight business.

A. Yes, sir.

Q. Do you mean by the expense of handling a ton of freight per mile in your *local* freight business, was three to six times as much as the expense of handling a ton of freight per mile in the *through* freight business?

A. In a general way, yes."

And again, in speaking of certain matters of expense, he says (p. 446):

"A. I should think that was fair as to certain classes of maintenance, but there are a good many parts of the maintenance of the railroads that have to be taken care of for local business that are practically of no benefit for the through business. A small station building, maintained entirely for the *benefit of local* business, is of *no use to the through* business whatever."

And the fact that all the comparisons of expense which the witness had made were meant by him as comparisons beween *local* or *way trains* on one hand, and *through* trains on

the other, is emphasized and placed beyond dispute by his further testimony (p. 459):

> "Q. Are you using "*through*" and "*local*" freight in the same sense that I have described them?
> A. I don't know if we do or not. As I understood the objection that the counsel of the railroad interposed, they understood "local" freight to mean freight moved in Missouri.
> Q. I am asking you about local freight without reference to whether it originates or ends in the State, and I understand you have been giving it the same meaning?
> A. I am frank to say that I consider it local, even if it crosses the State line.
> Q. There is no misunderstanding between us. *Local freight* is what is handled on *local freight trains.* And *through freight* is what is handled by *through freight trains, in your testimony?*
> A. *Yes.*"

Mr. Clark offered his opinion upon the question of extra cost, and gave the reasons for his opinion, all of which pertained to the way freight train service and its incidents. His testimony upon these points has already been quoted from.

He then testified (Record, Vol. II, p. 1635):

> Q. Before you pass from the item of cost by reason of the expensiveness of what you term the way freight trains, I understand that by that you mean that because State freight is carried in that kind of a train, therefore it would cost the company four or five times as much to do the State freight business as to do the interstate business?
> Mr. Hagerman: That is not a fair assumption. Those are some of the reasons. You have not permitted him to tell all the reasons.
> Mr. Kennish:
> Q. Isn't that the reason, so far as the extra cost of the train in which the freight is carried is concerned?
> A. *I am comparing the cost of the way freight train with the through freight train.*

Q. You assume that the State business, of course, is done on the way freight trains?

A. On the Missouri Pacific we have four classes of freight trains.

Q. Is that right? Were you using *way freight trains* as the trains upon which the State business was carried, and, therefore, the State business cost the company that much more *by reason of that fact?*

A. *Yes, sir.*

And again (p. 1637):

Q. You were speaking of *through* business as contrac(s?)ted with the business done on the *way freight* trains, weren't you?

A. *Yes, sir.*

Q. You were dividing freight into those two general classes?

A. Yes, sir.

Q. *Through* business and that which is done on the *way freight trains?*

A. Yes, sir.

Q. And you give the reasons why the business done on the *way freight* train would be *more expensive* to the company than that done on the *through freight* trains?

A. Yes, sir.

Q. *You speak then of State freight, of course, as being done on the way freight trains?*

A. *Yes, sir.*

Q. *And the through freight as being interstate freight?*

A. *Yes, sir.*

Q. Those are the two classes into which you would divide all the freight business done by the Missouri Pacific Railroad in the State of Missouri, and you say that the freight that is carried on the *way freight train* costs the company about four to five times more than the freight which is carried on the *through freight trains?*

A. *Yes, sir.*

And again (p. 1640):

"Q. I don't think I asked you about that. I asked you if you did not assume that all the through

freight in the classification you made was interstate freight?

A. All through freight interstate freight?

Q. Yes, when you divide the freight between through and way freight, you mean the through freight was interstate freight?

A. Yes, sir; but not absolutely every car.

Q. Not absolutely?

A. If you let me explain that I can answer the question.

Q. Do you or don't you assume that the through freight, as you designate it, means interstate freight?

A. Practically, yes, sir.

Q. That is practically the effect of your answer?

A. Yes, sir."

And again (p. 1641):

"Q. Your opinion upon which you based the extra cost of the State freight as four to five times than what interstate freight cost, was *applicable to way freight trains entirely, as compared with through trains,* and assuming that the way train carried State freight and the through trains carried interstate freight?

A. *Yes, sir;* because if we had no State freight we would not have any way trains."

And again, on re-direct examination, he said (p. 1644):

Mr. Hagerman:

"Q. I presume there is some particular class of freight that costs ten times as much to handle as some other kinds. But the point I am getting at is, your estimate of four to five times, taking everything into consideration, is it applicable to the State freight as distinguished from the interstate?

A. I don't know that I understand you.

Q. Mr. Kennish asked you—

Mr. Kennish: I suggest that counsel let the witness state for himself.

The Master: The examination is quite leading.

Mr. Hagerman:

Q. My question originally was, how much more it costs to do the State freight business, as distin-

guished from the interstate: And you said four or five times more?

A. Yes, sir.

Q. Now, Mr. Kennish construes your meaning to be that you only meant it cost four or five times more to do the way business than the through business between these divisional points?

A. *Yes, sir; that is correct.*

Q. Which is it you mean?

A. The way business. It costs four or five times—I am making a safe figure for myself, though I can sit down and figure, as poor a figurer as I am, that it costs four or five times as much to handle this way business within the State than it does both classes of through business, interstate.

Q. I want your opinion, taking everything into consideration, considering the fact that interstate freight may be carried upon way trains, and State traffic may be carried upon though trains, taking everything into consideration, and say how much more does it cost to do the State freight business than the interstate?

A. There is so little interstate business carried on the way freight trains that it does not reduce my ratio of four or five to one.

Q. So your ratio of four or five to one would apply to the freight question as I put it?

A. To the small amount of interstate freight that is carried on the way freight trains."

The fact that the witnesses, when they give opinions as to relative expense, have constantly in their minds the difference between the expense of way and of through trains, and that it is an opinion upon *that* difference which they really intend to express, is illustrated by the testimony of Henry Miller, General Manager of the Wabash Railroad Company. He had, until a comparatively short period before giving his testimony, been connected with the complainant's system in Missouri nearly all his life. (Record, Vol. III, pp. 2826-7).

He also said that the extra cost was practically the same on the Wabash, the Missouri Pacific and the Burlington (the complainant) (p. 2831).

Mr. Miller, in his testimony already referred to, had said, in answer to a question by counsel for the Wabash Company, that "the business of Missouri would cost, to handle it, two or three times as much as the interstate or *through* business, as it is handled on the railroad." (Record, Vol. III, p. 2829.) And then, being asked to "indicate the foundation of your opinion," he at once proceeds to specify the respects in which a "way train" is the most expensive, and among other things remarks (p. 2829): "I should say, by way of comparison, that a *local* train might average 100 tons where a *through* train would average 300 tons." He says, "the *way freight* uses more time. They are usually scheduled at about half the rate of speed the *through freights* are." "It is necessary to have more frequent water stations, about twice as many, for the *local* trains as for the *through trains.*"

Some parts of Mr. Miller's testimony seem inconsistent with others, but that in his mind the dividing line was between way and through trains, is apparent.

He said (pp. 2843-4):

> "Q. Yesterday you said, and I am quoting from your own language now, 'I should say that the business in Missouri would cost to handle two or three times as much as the interstate or through business as it is handled on the railroad. The State business is handled very largely on what are known as local trains. Business in Missouri, I should say, would cost to handle two or three times as much as the interstate or through business.' Now, what did you mean when you used the expression 'through business?'
>
> A. Interstate business.
>
> Q. Is there any difference then? You say 'interstate or through business.' Is there any dif-

ference in that expression? Does 'interstate' mean the same as 'through' there?

A. Yes, sir.

Q. Just exactly?

A. Yes, sir.

Q. You say that interstate and through business mean the same thing, as you used those terms?

A. Yes, sir.

Q. What would you call a full car load of iron shipped from St. Louis to Kansas City. Is that through business.

A. That is State business.

Q. Is that through business.

A. Not as I classify it.

Q. When you speak of 'through business,' you mean interstate business. Is that it?

A. Yes, sir. Business moving through in through trains that run through more than one State.

Q. So when you speak of 'through business,' you mean business which passes from Missouri into another State, or passes from another State into Missouri?

A. In through trains.

Q. In through trains?

A. Yes, sir.

Q. What is a 'through train?' Go back to my other question now: Take a full car load of iron shipped by a dealer in St. Louis to a dealer in Kansas City: What kind of a train would you put that in?

A. That would be a Missouri train, and different. *I should say a through train was a train scheduled from Kansas City to Buffalo.*

Q. Well, that is a through train?

A. Yes, sir.

Q. From Kansas City to Buffalo?

A. Yes, sir *or from Kansas City to Chicago.*

Q. Any other through freight trains on your road? There are two?

A. Those are illustrations.

Q. Are there any more?

A. There are a great many trains that run through two or more states.

Q. A through train, as you use the expression

here, is a train which goes into or through two or more States?

A. Yes, sir.

Q. And a train starting from St. Louis and running to Kansas City, you do not call a through train?

A. *It would be a through train for Missouri.*

Q. Is it a through train?

A. Not in the sense I describe it.

Q. Let me refer again to your testimony. I want to know exactly what you meant when you said 'I should say the business in Missouri would cost to handle two or three times as much as the interstate or through business.' Now, in that connection, are we to understand that your unit, when you speak of two or three times, is the through business, and that you mean by 'through business' interstate business exclusively?

A In the example you cited, the train from St. Louis to Kansas City, might be termed a through train for Missouri. It runs across the State.

Q. I want to know whether you mean to say that the business in Missouri would cost to handle two or three times as much as it would cost to handle that car load of iron from St. Louis to Kansas City.

A. That car load of iron was included in my estimate.

Q. Included in what?

A. Included in my estimate of the handling of the business in the State. There are some through cars that move from St. Louis to Kansas City. That is one item. That is for the full length across the State. There are other cars that move only ten miles. I took into account the long haul and the short haul.

Q. Then by 'through or interstate business' those terms are synonymous, are they. You do not include in through business any business that originates and ends in the State of Missouri, at all?

A. *Yes, sir; it is handled in the through train.*

Q. When you say that the business in Missouri costs two or three times as much to handle as interstate or through business, by the expression 'through

business' you do not include any business which originates and ends in Missouri, do you?

A. *Yes, sir.*

Q. You do?

A. Yes, sir. *I include that car you just specified, St. Louis to Kansas City.*"

Still, he says (p. 2845) that "the business originating and ending in Missouri, of all kinds, costs on an average two or three times as much as the interstate business which goes out of, comes into or passes through Missouri."

And again Mr. Miller says (pp. 2850-2):

A. Yes, sir; but as a rule the through train has a full train of through freight. It does not occur very often that that train would set out a great many cars at Moberly.

Q. Do you mean by the *through train, a train that is loaded to its capacity with through car loads from Chicago to Kansas City?*

A. *Yes.*

Q. That is what you mean?

A. Yes, sir; and the train is run because there is sufficient traffic to warrant its being run over it.

Q. A through train, as you have meant to express it here, means a train running from Chicago to Kansas City with an engine loaded to its full capacity, with full car loads of freight, all of it to go all the way to Kansas City from Chicago?

A. Full car loads—we have car loads and L C. L. We have cars full and less than car load business.

Q. That is what I mean. The cars themselves would be full?

A. Yes, sir.

Q. The through train then has the same constituent or the same elements when it reaches Kansas City that it had when it left Chicago?

A. Yes, sir.

Q. There has not been any dropping out or taking on?

A. No, sir.

Q. *That is what you mean by a through train, is it?*

A. Yes sir

The usual hour of recess having arrived, recess was taken until two o'clock p. m.

After recess on December 19, 1906, the following proceedings were had:

The cross-examination of Mr. Henry Miller was continued by Mr. Ladd:

Q. Mr. Miller, when you speak of one kind of business costing two or three times as much to handle as another kind of business, you mean, I take it, that it costs two or three times as much per ton mile?

A. Yes, sir.

Q. You spoke this morning of a train which would be loaded at Chicago and go through to Kanssas City intact, with the same freight unimpaired, or not enlarged or increased at Kansas City, that it had at Chicago; and you spoke of that as a through train: Now, *is it business on a train of that kind which costs one-half or one-third as much to handle as the State business?*

A. *Yes, sir.*

Q. It is business carried in a *train of that kind* constituted in that way, *which you mean when you speak of through business?*

A. *Yes, sir.*

Q. There is one train, from Chicago to Kansas City, I suppose the same would be true of a light (like?) train from Kansas City to Chicago: That would be on the same principle?

A. Yes, sir.

Q. Both of those trains go clear across the State: That is true?

A. Yes, sir."

And again, in giving the reasons for his opinion that the cost of through business on a train from Buffalo or Chicago to Kansas City would be only one-third or one-half that

of the State business, and he immediately proceeds to enumerate the particulars in which the *way freight train* is more expensive, because it is those things, and those things only, which influence him to his opinion. He has no other reasons. In his mind, ever present, the two opposing factors are the *way train* and the *through train* (pp. 2860-1).

> "Q. You said that, in your opinion, the State business in Missouri would cost two or three times as much to handle as the *through business, on this Buffalo and Chicago train*, that you mentioned a while ago, those six trains: Can you offer any evidence in support of that opinion?
>
> A. Only the instance I cited yesterday that these trains that do the State business carry a very light tonnage, comparatively.
>
> Q. I am asking you if you can offer any evidence.
>
> A. No, sir. My statement was based on experience, you cannot state in any particular, constituting any one of the particlulars which constitute the whole work of doing the business, you cannot state approximately how much more in that particular it costs per ton mile than it does to do this through business, between Chicago and Buffalo on the one hand, and Kansas City on the other hand?
>
> A. I have said approximately it costs three times as much.
>
> Q. I know there are a good many items, which you know better than I do, which go to make up the general body of operating expenses: But can you tell me with respect of any one item, how much more it costs?
>
> A. Assuming the through business could be handled at four mills per ton per mile, according to my estimate, it would make the cost of handling the local business three times that
>
> Q. Four mills?
>
> A. Yes, sir.
>
> Q. It would make the State business cost twelve mills?
>
> A. Yes, sir.

Q. You said two or three times: Then it would be eight or twelve mills?

A. Yes, sir.

Q. That is the result of it. But can you produce any figures or the results of any tests to justify your opinion?

A. No figures. It is one of these things that a man learns by experience, and you cannot rub out the experience.

Q. *Will you give your reasons for the extra expense: Of what does the extra expense consist?*

A. The first item is wages.

Q. Wages of what?

A. Everybody conected with the handling of the freight.

Q. I would like to be as definite as I can, that is pretty broad.

A. Train men, engine men, station men; and in the maintenance.

Q. Maintenance of what?

A. Maintenance of the equipment and of the road. Because you have to maintain for these *local train* the same main track and passing tracks that you maintain for the *through trains.*

Q. What is that, Mr. Miller?

A. You have to maintain for the *local trains* all the things you have to maintain for the *through trains,* and in addition you have the sidings for *local business,* including elevated tracks, stockyards, warehouse facilities, and the labor cost.

Q. What do you mean by 'labor cost?'

A. Whatever freight handling you have, and clerical force.

Q. Aren't your freight handlers included in your station men?

A. Yes, sir.

Q. That is included?

A. Yes, sir.

Q. What else?

A. A locomotive is practically used *on a local train* going over one division, twenty-four hours. On the *through trains* that same engine can easily make a round trip. The *local train* hauls about one-third of the capacity of the engine, and the *through*

train, as a rule, is loaded to the full capacity. The *local trains* having to do the switching, loading and unloading of freight at stations, make a great deal of overtime, something which seldom occurs to a *through train*. One hour's overtime on a train means an increase of ten per cent. in the wages. It is not infrequent that they get in two, three or four hours overtime on those trains. In picking up stock, the shipper sometimes has not his shipment at the station, it is on the way, or he has just arrived and the train has to wait. All those things get into the cost. It is necessary to maintain more water stations for the trains *doing local work* than it is for the through trains. The *local trains use more coal*, too. And supplies of every kind. The *local business* is re-handled more or less; at unimportant stations less than car load business in the warehouse and car load business in the yard; all of which adds to the cost."

Mr. Tyler had testified that the cost was three to five times as much. (Record, Vol. IV, p. 4101.)

But on his cross-examination he testified explicitly, in language that can have no other meaning, that his comparison was really between the expense incident, respectively, to *way* and *through* trains. (Record, Vol. IV, p. 4138):

"Q. When you come right down to what we might call 'scientific accuracy,' *you really don't mean the relative cost between State and interstate at all*, but you really mean the *difference between through and local?*

A. *Yes.* The interstate feature does not interfere with it. *It is 'through' or 'local' wholly.*

Q. And you rely on what you assume with respect to the through and local and State and interstate very largely because you assume that the through is mostly interstate and that the local is mostly State?

A. That is the idea, yes.

Q. And while there is not an exact identity between them there is perhaps a substantial identity?

A. Yes.

Q. But strictly speaking, you *make your differentiation between through and local?*

A. Yes, between through and local freight and with reference to long and short hauls.

Q. That again comes to through and local very largely?

A. Yes.

Q. And all your statistics that you have and then the special observations you make *have reference to through and local rather than to State and interstate?*

A. *Yes.*"

E.

THE WAY TRAINS CARRY INTERSTATE FREIGHT, AND THE THROUGH TRAINS CARRY STATE FREIGHT.

The through freight trains, so called, pass over a complete division of the road, and the way freight trains operate between division points. (Record, Vol. I, p. 497.)

The division points upon complainant's main line of railroad in Missouri, are at St. Louis and Hannibal, on the Mississippi river; Brookfield and Cameron, in the interior; and Kansas City and St. Joseph, on the Missouri river. (Vice-President Willard's testimony, Record, Vol. I, p. 498.)

Interstate freight originating between division points in Missouri, is hauled by the way train to the nearest division point. (Willard's testimony, Record, Vol. I, p. 505.)

Interstate freight originating out of Missouri and destined to stations in Missouri between division points, is hauled on a through train to the nearest division point, and there it is put into a way train for distribution and delivery

at its places of destination. (Willard's testimony, Record, Vol. I, pp. 505-6.)

Bethard's testimony, Record, Vol. II, p. 1830.

Testimony of Mr. Miller, General Manager of the Wabash Railway. (Record, Vol. III, pp. 2847-50, 2853-4, 2856.)

But not only is interstate freight thus handled on the costly way train; it is also the fact that *State freight is hauled on the cheap through train.*

State freight, loaded at a division point whose destination is beyond the next division point, is placed in a *through* train and hauled as far as the next division point in that train; its immediate neighbor in the train may be a car load of interstate freight from Boston, having the same destination. Those two cars will, in the same manner, leave the through train at the division point, there take their places in the way train, and proceed, in that way train, to the station of their destination, where they will be placed upon the same unloading track, perhaps still joined together by their original coupling. The treatment accorded to those two shipments, both in the through train and in the way train, and the expense incident to that treatment, are precisely the same. (Willard's testimony, Record, Vol. I, p. 506; Bethard's testimony, Record, Vol. II, p. 1828; Miller's testimony, Record, Vol. III, pp. 2848, 2855-8; Stith's testimony, Record, Vol. II, p. 1516; Doddridge's testimony, pp. 1611-12, 1615-16, 1582.)

And less than car load freight of both classes, State and interstate, are found *in the same car.* (Taliferro's testimony, Record, Vol. I, p. 899.)

That what are called the expensive way trains haul interstate as well as State freight, and that State freight is

transported on through trains, is not disputed by any witness whose attention is directed to the subject. But this important fact is persistently and studiously kept in the background, and the extra expense of the way trains (greatly magnified, as we think) is dwelt upon with much elaboration, and dealt with as a feature for which the State traffic is wholly responsible. Whenever a witness who has expressed an opinion that the handling of State freight costs relatively the most, is required to give the reasons for his opinion, he promptly enters upon a recital of the items of expense incident to the operation of a way train and to the maintenance of the facilities necessary, in his opinion, for its use.

A concerted attack has been made by railroad officials upon the local train which is regarded by them as almost an object of contempt. It is a constant trial to them. It is the black sheep of the family, the pariah of the railroad system, its hewer of wood, its drawer of water.

The fly in the ointment of the railroad operator's happiness is the way train; the ball and chain at the heel of his successful management, is the way train; of all the evils which beset railway administration, the way train is the crying one; and we are asked to believe that the State traffic is, virtually, the sole cause of its being, and that all the calamities flowing from its vexatious existence should therefore be charged to the account of that traffic.

We are to regard the existence of the way train as tolerated, only because required by law, and therefore a necessary but disagreeable incident of railroad operation. The great through train is the favored one, whose just burdens the complainants would, in this litigation, cast upon its more humble associate. But if there were no local trains, no local business, there would be no through trains, no through business. The through train never would have been heard of, it would not have been born, it could not live a moment were it

not for the way train. Indeed, the way train is the breeding and nursing mother of the through train. The local business is the foundation upon which the vast superstructure of through business rests. It furnishes all its constituent elements. It is the numberless little rills of local traffic, having their sources at the towns and villages and hamlets and cross-roads all over the country, which, gathering together and carrying the products of the farm and the forest, the shop and the mine, converge here and there and create the mighty river of through traffic. They are, in fact, the essential prerequisite to the existence of that river.

It is important, therefore, to ascertain, if possible, whether it be a fact that this undesirable feature of railway operation is maintained and the great expense thereof incurred for the benefit of the State business, as is claimed. If the fact be that it is in part maintained for the benefit of the interstate business, then the entire additional expense ought not to be charged to the State business. If it be a fact that it is maintained largely for the benefit of the interstate business, it follows that the larger share of the much exploited extra expense should be borne by that business. Obviously it is, in this immediate connection, of much consequence that the trier of fact be informed whether all the freight carried on these way trains was State freight, and if not, and a part of it was interstate freight, how much of each, or the relative proportion of each; informed, not as a matter of opinion or conjecture, *but as a matter of fact*. Obviously also, it was incumbent upon the complainant to produce evidence of that fact. Obviously, also, it was in its power, and practically in its exclusive power, to produce that evidence. But this record will be searched in vain for any testimony adduced by the complainant as to the proportion of State and of interstate freight transported upon its way trains.

But, notwithstanding the silence of this complainant, the

Chicago, Burlington and Quincy Railroad Company, upon this point, notwithstanding its apparent confidence that opinions will be accepted as a sufficient substitute for facts, this record does afford convincing evidence, sometimes unwittingly furnished by the associates of the complainant in this litigation, sometimes by actual tests made by the experts for the State, that a very large proportion of the freight carried upon the way trains is *interstate freight*. Some of that evidence will now be referred to.

Mr. W. B. Doddridge was a witness in the case of the Missouri Pacific Railway Company, and also in this case. He had large railroad experience. From 1893 to 1900 he was General Manager of the Missouri Pacific Railway system. (Record, Vol. II, p. 1569.) At the time of giving his first evidence (January 16, 1907), he was, however, engaged in other business (p. 1597). He had been an attentive listener to the evidence at nearly all the hearings in these cases before he gave any evidence himself (p. 1597). He was apparently regarded as one of the chief witnesses for the complainants in these cases. Indeed, he was recalled to the witness stand by the complainants no less than seven times. Mr. Doddridge gave lengthy, interesting and instructive disquisitions upon the subject of railway management, and his testimony threw much light upon some of the questions involved in this controversy.

It is to be gathered from his testimony that in his opinion, if the business of the Missouri Pacific Railway Company could be confined to a dozen through daily trains each way, between St. Louis, Missouri, and Pueblo, Colorado, each train composed of cars loaded with car load freight and as many of them as the engine could haul, stopping only to change engines and train crews, or for water or fuel, whistling in derision through the cities and towns and villages of Missouri

and Kansas, on their way, an ideal situation would be realized. In his opinion, all trains but such as these are deplorable, but necessary evils. All other trains increase the expense and reduce the net revenue of the company. And, in his opinion, this increase of expense, this reduction of net revenue, is to be ascribed to these way trains, and, therefore, by necessary corollary, to the freight which has its origin and destination within the boundaries of the State. But the supposed corollary is, in fact, a *non sequitur*, because his own tests show that *much the larger part of the freight carried upon these way trains* is *interstate freight*. It is true that these tests were made by him and offered in evidence for another purpose, but incidentally they do clearly show this fact.

In December, 1906, Mr. Doddridge examined the contents of six way freight trains on the Missouri Pacific Railroad. (Record, Vol. II, pp. 1589-90.) By far the larger part of the tonnage on these trains was in car load lots, only a little more than 4 per cent. of the whole being less than car load freight (pp. 1618, 1621). The car load freight on these trains was about 96 per cent. of the whole, and of the 96 per cent. *only* 37 *per cent.* was *State* freight, while 63 per cent. was *interstate freight* (pp. 1589, 1621). There was 70 *per cent more* interstate than State freight.

He said these six way trains carried an average tonnage of 175 tons (pp. 1589, 1621). If 4 per cent. of this (7 tons) be deducted for less than car load freight there remains in the train 168 tons of car load freight; 63 per cent. of it, or 105 tons, is interstate freight, leaving only 70 tons of State freight, even if all the less than car load freight be treated as State freight. His testimony, on cross-examination, was as follows (Record, Vol. II, pp. 1621-2):

> "Q. Mr. Doddridge you spoke yesterday of these local trains which you had investigated, and

you said, if I remember aright, that the average tonnage of those six way or local trains was 175 tons?

A. Yes, sir.

Q. That is right, is it?

A. Yes, sir.

Q. Now, it appears from your figures in regard to the freight handled at 88 stations, that a small fraction over 7 (4?) per cent. of it was in less than car load lots. That is right?

A. Yes, sir.

Q. Four per cent. of 175 tons would be, in round numbers, seven tons, wouldn't it?

A. Yes, sir.

Q. That would leave then 168 tons of car load freight on those way trains, 7 from 175: That is right, isn't it?

A. Yes.

Q. You also stated that 63 per cent. of the car load freight on the locals was interstate and 7 (37?) per cent. was State freight: Is that right?

A. Repeat that question.

Q. I asked you if you stated that 63 per cent. of the carload freight on the local trains was interstate freight and 7 (37?) per cent. was State freight?

A. Yes.

Q. The tonnage, as you say, on those way freight trains, the total tonnage being 175 tons, the percentage of less than car load freight 7 tons, which leaves 168 tons of carload freight: And you say that 63 per cent. of the car load freight on these local trains is interstate and 37 per cent. State freight, it follows that *if* (of?) those 168 tons of car load freight carried on these local trains, 105 tons was interstate freight and only 70 tons State freight: Isn't that right?

A. I will have to calculate that out to see. I presume that is right if your figuring is correct.

Q. It is not a difficult problem. Your less than car load freight is 7 tons, a little over 4 per cent.: Taking out of 105 (175?), the total tonnage of the trains, leave 168 tons?

A. Yes.

Q. You have already said that 63 per cent. of

the car load freight, that is, 168 tons, is car load freight?

A. Yes.

Q. And you have already said that 63 per cent. was interstate and 37 per cent. was State freight?

A. Yes.

Q. 63 per cent. of 168 tons is 105 tons, isn't it?

A. Yes, sir.

Q. And that leaves 70 tons of State freight, including both the car load and less than car load lots?

A. Yes, sir.

Q. I am including all less than car load there and charging that all up to the State. If 63 per cent. of 168 tons is 105 tons, that leaves 63 tons of car load freight, doesn't it?

A. Yes, sir.

Q. And there are seven tons of less than car load freight, and charging the less than car load to the State, it makes only seventy tons in all, doesn't it, Mr. Doddridge.

A. Yes, sir.

Q. So that is where a train is carrying one hundred and five tons of interstate freight, and only seventy tons at the outside of State freight: Those are your figures, aren't they?

A. Yes, sir; that is the way it figures out."

But this is not all. Mr. McPherson, assistant to the General Manager of the Missouri Pacific Railway Company, testified (Record, Vol. IV, p. 4295), that the average haul of interstate freight on his road in Missouri was 105 miles, and the average haul of State freight was 52 miles. Multiply 63 (the interstate percentage of freight on these way trains) by 105 and we have 6615; multiply 37 (the State percentage) by 52, and we have 1924.

The ton miles of freight hauled by this way train would then be in the proportion of 6615 interstate and 1924 State; the interstate being 3 2-5 as many as the State, and the train therefore performing 3 2-5 times as much service for the interstate as for the State business.

But it is only fair to say that the average haul of 105 miles related to the whole interstate traffic, both that which originated or terminated in the State, which in this record is often referred to as "second class" interstate, and that which comes into, passes through and out of the State, which is referred to as "first class" interstate. Mr. McPherson accepted as true the result of the investigation of the experts for the State upon this point, as shown in a table compiled by them. (Record, Vol. III, p. 2407.)

It is fairer to the complainant to make the comparison between State freight and that class of interstate freight which originates or terminates in the State. According to a table (Record, Vol. II, pp. 1415-16), prepared jointly by experts on both sides, the average haul of this class of interstate freight upon the complainant's railroad in Missouri, is 124 miles, and of State freight 81 miles. Multiplying then, 63 by 124, we have 7812; multiply 37 by 81, and we have 2997. The ton miles of freight hauled by this way train would then be in the proportion of 7812 interstate, and 2997 State; the interstate being 2 3-5 times as many as the State, and the way train therefore performing 2 3-5 times as much service for the interstate as for the State business.

The tabulated statement regarding the six local trains, prepared under the supervision of Mr. Doddridge, was offered as Exhibit 14, and is found in Vol. III, p. 2400. But subsequently a clerical error was discovered in it, which was corrected (Record, Vol. II, p. 1914), and the corrected table is in Vol. III, p. 2401.

Mr. Doddridge had testified from this statement (Record, Vol. II, p. 1589), that of the less than car load freight carried on these trains, only 7 per cent. was interstate, and that 93 per cent. was State freight. The corrected statement

shows that 14 per cent. of this class of freight was interstate and 86 per cent. State.

And of the total tonnage of these six way trains, 59 per cent. was interstate and only 41 per cent. State freight (Exhibit 14, Record, Vol. III, p. 2401); (Ludlam's testimony, Record, Vol. I, p. 1159).

Mr. Hamilton, under the direction of the experts for the State, made certain investigations covering freight trains upon the St. Louis and San Francisco Railroad. The performance of the trains on July 17, 1907, was examined. That date was selected by the superintendent of transportation of the railroad company on the basis of its tonnage and ton mileage. (Record, Vol. IV, p. 4608.) Mr. Hamilton's testimony, detailing the results of this examination, is found in Vol. IV, pp. 4608-17. His information was obtained from the wheel reports and way-bills of the company.

He ascertained the relative tonnage of State and interstate freight on eight way freight trains running on the Memphis division on that day, four of them being northbound and four southbound.

On the four southbound trains there were:

State car loads, 270 tons.

Interstate car loads, 546 tons.

Less than car load freight, 70 tons.

(Record, Vol. IV, pp. 4614-15.)

The car load *interstate tonnage was twice as great* on these way trains as the State car load tonnage (p. 4615).

The less than car load freight was not classified between State and interstate, as it was impracticable (p. 4613).

The total tonnage on these trains was 886 tons, and the less than car load freight was less than 8 per cent. of the whole.

The examination of the four northbound way trains, running on the same day and the same division, showed:

State car loads, 1306 tons.

Interstate car loads, 603 tons.

Less than car load freight, 75 tons.

The less than car load was thus less than 4 per cent. of the whole (p. 4615).

He also investigated through trains running on the Memphis line on the same day, the trains being numbered 855, 821 and 856. His testimony in reference to them is found on pages 4610-4613. The witness did not state the percentages, but it is to be gathered from his testimony that the State car load lots in these through trains were, in tons, as follows:

10
33
26
349
49

Total.....467

The interstate car loard freight was, in tons, as follows:

277
464
15.3
511
464
872

Total.....2603.3

The total car load tonnage of those three *through freight trains* was, then, 3070, of which the *State tonnage constituted* 15 *per cent.*

There was, on the same day, another through train, numbered 822, which carried little, if any, State freight.

All these trains carried considerable quantities of less than car load freight, but it was impracticable to classify it between State and interstate.

Mr. Hamilton also investigated six way trains between St. Louis and Monett, which had run on the same day.

On these the State car load freight was 476 tons.

The interstate car load freight, 471 tons.

Less than car load freight, 216 tons.

(P. 4617.) On these trains the State and interstate car load freight was about equal.

He also examined the results of the operation of sixteen through trains between St. Louis and Monett.

The State car load tonnage was 366 tons.

The interstate car load tonnage was 2639 tons.

Less than car load freight, undivided between State and interstate, 992 tons (p. 4617).

Consolidating the results of these through trains with those already mentioned on the Memphis line, making in all twenty-four through trains, the State car load freight was 11.6 per cent. of the total tonnage of those trains.

The State car load ton miles were 12.5 per cent. of the total ton miles of the twenty-four through trains (p. 4517).

Mr. Peabody, the statistician of the Atchison, Topeka and Santa Fe Railroad Company, was a witness on behalf of the complainant. (Record, Vol. IV, p. 4404.) He gave his testimony December 18, 1908.

For the purpose of making some calculations as to the relative cost of State and interstate freight business, he caused two tests to be made on the line of his company in Missouri; one was from November 18 to November 24, 1908, and the other from November 30, to December 6, 1908. His tests covered every freight train, both through and way, run-

ning on the line during those periods (p. 4419), 123 through appeared in certain tables prepared by him; one, Exhibit 41 (Record, Vol. V, pp. 4935-6), and the other, Exhibit 42 (Vol. V, pp. 4937-8).

Although the tests were made and the exhibits prepared for quite a different purpose, they incidentally contain valuable information bearing upon the question now under discussion.

From Exhibit 41, which is applicable to his first six-day period, it appears that the *way trains* carried freight, as follows:

State freight, 863 tons.
Interstate freght, 2024 tons.
On these way trains:
The State freight is 29 per cent. of the whole.
The interstate freight is 71 *per cent. of the whole.*
On these way trains there were:
State freight, 37,951 ton miles.
Interstate freight, 165,553 ton miles.
The State freight was 18.6 per cent. of the total ton miles.
The interstate freight was 81.4 *per cent. of the total ton miles.*

On the through trains for the same period the freight, measured in tons, was as follows:

State freight		1905 tons
First class interstate.....	29,054	
Second class interstate.....	9,745	
		38,799 tons

Of the tonnage on these through trains:
The State freight was 4.7 per cent. of the whole.
The interstate freight was 95.3 per cent. of the whole.

In ton miles, the figures were as follows:

State freight		83,795 ton miles
First class interstate freight....	5,411,836	
Second class interstate freight...	797,201	
		6,209,037 ton miles

The State ton miles was 1.3 per cent. of all the ton miles.

The interstate ton miles was 98.7 per cent. of all the ton miles.

Of the total *State freight* carried on trains of all kinds during this period, *much the larger part was found in the through trains:*

Tons of State freight on local trains.....	863
Tons of State freight on through trains.....	1,905
	2,768 tons

Of all the State freight handled by the company during that period on all of its freight trains, there was thus carried, in tons:

On the way trains, 31 per cent.

On the through trains, 69 per cent.

Of the total ton miles of State freight there were carried:

On way trains, 37,951, or 31.17 per cent.

On through trains, 83,795, or 68.83 per cent.

Mr. Peabody's Exhibit 42, covering the second six days period, showed that the way trains carried, in tons:

State freight, 892 tons.

Interstate freight, 2039 tons.

The State freight was *only* 30.4 per cent.

The interstate freight was 69.6 *per cent.*

In ton miles:

State freight was 29,208.

Interstate freight was 169,493.

State freight was 14.6 *per cent.* of the ton miles.

Interstate freight was 84.4 *per cent.* of the ton miles.

Total freight carried on all the through trains during the same period was, divided into tons, as follows:

State freight		1,511 tons
First class interstate freight	2,311	
Second class interstate freight	6,191	
		29,202 tons

The State freight tons were 5.3 per cent of the whole.

The interstate freight tons were 94.7 per cent. of the whole.

The ton miles carried by these through trains were divided as follows:

State freight		60,640 ton miles
First class interstate freight	4,579,108	
Second class interstate freight	1,005,071	
		5,584,179 ton miles

Of the ton miles:

State freight was 1.07 per cent.

Interstate freight was 98.93 per cent.

The entire volume of State freight hauled on freight trains of every kind during this period, was as follows:

Local trains	892 tons
Through trains	1,511 tons
Total	2,403 tons

Thus, of the total State freight, there was carried:
In local trains, 37 *per cent.*
In through trains, 63 *per cent.*

Combining the results of these two periods, this apears:
The through trains carried, in tons:
State freight, 4.8 per cent.
Interstate freight, 95.2 per cent.
The through trains carried, in ton miles:
State freight, 1.2 per cent.
Interstate freight, 98.8 per cent.

The local trains carried, in tons:
State freight, 30.2 per cent.
Interstate freight, 69.8 per cent.

The local trains carried, in ton miles:
State freight, 16.7 per cent.
Interstate freight, 83.3 per cent.

Of the entire volume of State freight handled, there was, in tons:
On way trains, 34 per cent.
On through trains, 66 per cent.

Of the entire volume of State freight handled there was, in ton miles:
On local trains, 31.8 per cent.
On through trains, 68.2 per cent.

Generalizing, then, very *much the larger part of the freight carried on the way trains is interstate freight.*

Very much the larger part of the total volume of State freight is *carried on through trains.*

Every pound of interstate freight received at or shipped from the towns and stations on the branch lines *is transported* on the way train, because on these branch lines *there is no through train.* The cattle and hogs, the grain and other products of the fertile territory whose first market is at one of these towns or stations, and from them are shipped to Chicago or other larger markets outside the State, find their way to the main line of the railroad and to the great through trains only by means of the way train. (Doddridge's testimony, Record, Vol. II, pp. 1581, 1615.)

"Q. It follows, then, doesn't it, Mr. Doddridge, that local or way trains on all these branches you have mentioned carry all the interstate business?

A. They carry all the freight business.

Q. Yes, the entire thing?

A. Yes, sir."

Mr. Willard, the complainant's vice-president, so testified (Record, Vol. I, p. 499):

> "Q. Do what you call through freight trains operate on any of those branch lines?
>
> A. I cannot say from my definite knowledge now that they do, but I think not.
>
> Q. That would be your idea?
>
> A. Yes."

Mr. Fisher testified to the same effect, that upon the branch lines there are no through trains, but the entire service, both State and interstate, is provided by way trains. (Record, Vol. II, p. 1762.)

F.

TERMINAL CHARGES.

One of the reasons given by witnesses for the railroad companies for their opinions that the expense incident to State freight is greater than in the case of interstate freight is that the State freight has two terminals in Missouri, and interstate but one. Therefore, the expenses of two terminals must be borne by State freight, while the interstate business has the expense of but one terminal.

It is true, that as strictly State freight originates and terminates within the borders of the State, there are two terminals in connection with its handling; one at its place of origin, the other at its place of destination. But it is not correct to say that all interstate freight is chargeable with the expense of only one terminal in Missouri. As to interstate freight originating in the State, it has one terminal expense at its place of origin. It may, and often does, incur another terminal expense before it leaves the State on its way into another state. As to interstate freight whose origin is in another state and whose terminal is in Missouri, it has one terminal expense in Missouri at its place of destination. It may, and often does, incur another terminal expense in Missouri before it reaches its destination.

It is, therefore, not accurate to say in respect of two tons of freight of the same class, having the same point of destination in Missouri, one of them having its origin in Missouri and the other outside of the State, that the terminal charges in Missouri incurred by the State ton are twice as much as those incident to the handling of the interstate ton.

Interstate business in less than car load lots (and this is the expensive part of the business) received by the complainant at its important eastern and western terminals in Missouri from a connecting road is, at the point of connection, unloaded from the car of the connecting road, loaded into complainant's warehouse, and then reloaded into one of complainant's cars in a train, for its point of destination within the State. As to such business the terminal charges for interstate business are larger than for State business, because at the point of connection there is one additional unloading.

In the case of less than car load State business there is one loading at the point of origin and one unloading at the point of destination. In the case of interstate less than car load business, under the circumstances just mentioned, there is one unloading at the place of connection, a loading into the car at that place, and another unloading at the point of destination.

The testimony upon this point is very clear.

C. S. Ludlam, one of the State's experts, testified as follows:

> "Q. Mr. Ludlam, in your judgment is the cost per ton mile of handling State less than car load business any greater than the cost per ton mile for handling less than car load interstate business?
>
> A. No, sir.
>
> Q. Why?
>
> A. The cost of handling interstate less than car load business, in my judgment, would be more than handling the State less than car load business for two reasons principally:
>
> The first one is, that the majority of interstate less than carload business is unloaded at the station and then reloaded and then unloaded at destination. That means that interstate less than car load business is loaded once and unloaded twice. Whereas, State less than car load business is loaded once and unloaded once.

Q. Interstate less than car load business is loaded twice and unloaded once?

A. Yes, sir; that is right. Assuming that the distance were the same. But, as a matter of fact, we find from an analysis of the Missouri Pacific waybills that the interstate less than car load business moves on an average 200 miles as compared with the State less than car load haul of 108 miles.

Speaking generally, less than car load or package freight is unloaded and reloaded at each terminal; consequently the longer the haul, the more frequently the freight is handled. The interstate, less than carload freight, is hauled on an average 200 miles, as compared with the State less than car load business haul of 108 miles."

(Record, Vol. I, p. 872.)

And again:

"Q. Now, take less than car load freight. Now, (How?) would the expense of handling less than car load freight at St. Louis, received from a connecting line at St. Louis, compare with the expense of handling less than car load freight whose origin was St. Louis?

A. I think the expense to the company in handling the less than car load freight which was received from connecting lines would be greater than the expense of less than car load freight that originated at St. Louis.

Q. Why?

A. Because there would be an additional handling, as a general proposition. The less than car load freight delivered by connecting lines would have to be unloaded from the car in which it was received, and then reloaded into the Missouri Pacific car on which it was forwarded out of St. Louis.

Whereas, in the case of freight that originated at St. Louis, there would be merely the loading into the car on which it was forwarded out of St. Louis.

Q. There is an additional unloading?

A. Yes, sir; a large part of it."

(Record Vol. I, p. 1142.)

Mr. Taliaferro, one of the State experts, testified as follows:

"Q. Based upon your same knowledge and information, I will ask you whether, in your opinion, it costs any more to handle State less than car load freight than interstate less than car load freight, per ton mile?

A. I think it costs less to handle interstate less than car load freight.

Q. It costs less to handle interstate less than car load freight?

A. Yes.

Q. Than it does to handle the State less than car load freight?

A. Yes, sir.

Q. Why? What is the difference?

A. The idea I have in my mind is, that it is not practicable to load less than carload freight for a long haul. It has to be handled and rehandled many times in going a long distance. Freight coming from Chicago, we will say, by the Burlington, to a point in Missouri, might be, and I think from the information I have gotten about these matters generally since I have been looking into them, would be rehandled at Hannibal; or any other road would have to receive the shipment from the connecting line at the Mississippi river, unload it, and reload it in some car going out over their line. Whereas, a shipment starting from Hannibal or St. Louis would be delivered into the freight house at the proper door, just where it would be put right into the car that the company would use for forwarding it.

Q. Would the cost in that respect of handling interstate less than car load freight be greater or less than the handling of strictly State less than car loads?

A. I think it is more.

Q. You said awhile ago you thought it was less.

A. If I recall, I think I said the cost of handling less than car load interstate business in the State of Missouri was, to my mind, more than the cost of handling State less than car load freight.

Q. I think you turned it around in answer to my first question.

A. I didn't intend to.

The Master:

Q. Your judgment is, it costs more to handle interstate less than car load freight?

A. Yes, sir."

(Record Vol. I, pp. 898-9.)

Also (Record Vol. III, p. 3022).

And the testimony of Mr. Bethard, Superintendent of Transportation of the Missouri, Kansas and Texas Railroad Company is to the same effect. (Record, Vol. II, pp. 1830-1.)

Mr. Miller, General Manager of the Wabash Company, describes the same course of business.

If interstate less than car load freight from Cincinnati, Ohio, consigned to Orrick or Carrollton, points on the line of the Wabash Railroad in Missouri, comes from Cincinnati to St. Louis on the Baltimore, Ohio & Southwestern line, it is unloaded from the Baltimore, Ohio & Southwestern car and carried by dray to the Wabash warehouse in St. Louis, into which it is unloaded and from there loaded into a Wabash car to be carried west towards its destination. The whole expense of this transaction from its eastern connection to its own warehouse is paid by the Wabash Company. This, and the reloading into its own cars, are terminal expenses at St. Louis, in Missouri. No part of this expense except that of loading into its own cars is an incident of the State business. From all of the expense incident to the unloading from the Baltimore, Ohio & Southwestern cars, the hauling to and unloading into the Wabash warehouse at St. Louis, the State business is exempt.

(Mr. Miller's testimony, Record, Vol. III, pp. 2855, 2897.)

This terminal expense at St. Louis, Missouri, is obviously

greater than in the case of like State freight originally shipped from St Louis.

Again, Mr. Miller's road has a through line from Chicago to Kansas City. It crosses the Mississippi river at Hannibal (in Missouri). Less than car load freight from Chicago to Moberly, Missouri (a division point), would, at Hannibal, be unloaded from the car in which it left Chicago and put in another car, which would take it to Moberly.

At Hannibal, therefore, there is an unloading and a reloading of the interstate freight; an *unloading* unnecessary in the case of State freight originating at Hannibal.

And in the case of less than car load freight shipped from Chicago to Carrollton, a point beyond the division point of Moberly, it would not only be unloaded and reloaded at Hannibal, but it would be again unloaded at Moberly and reloaded into another train, which would carry it to Carrollton.

(Mr. Miller's testimony, Record, Vol. III, pp. 2880-1.)

This interstate terminal expense at Hannibal is thus manifestly greater than would be incident to less than car load State freight whose point of origin was Hannibal.

The complainant also has a through line from Chicago, Illinois, to Kansas City, Missouri. It also crosses the Mississippi river at Hannibal, Missouri. The information of Mr. Taliaferro (Record, Vol. I, p. 898) is that all the loss than car load interstate freight coming over the complainant's road into Missouri from the east is unloaded and reloaded at Hannibal.

The complainant has vouchsafed to the court no information as to its dealings with less than car load interstate freight at Hannibal, and it may therefore be fairly assumed that its custom in that respect corresponds to that of the Wabash Company at that point, and that less than car load interstate freight is there unloaded and again reloaded

and thereby incurs the additional expense of one unloading, from which less than car load State freight is wholly exempt.

And the assertion that interstate *car load* freight incurs but one terminal expense in Missouri as against two for State car load must, in the light of the evidence in this record, be regarded as a very loose statement.

Interstate car load freight, whose destination is a point in Missouri, which is received by the last carrier from a connecting company at some point in Missouri, does incur a terminal charge at the place of connection. The car must be received, shunted from one track to another, often for a considerable distance and placed in the train which is to move it to destination. That car load is also often rebilled at the point of connection. In the case of car load freight having both its origin and destination within the borders of the State, the railroad company receiving the same places an empty car upon a team or loading track and the car is there loaded by the consignor. At the point of destination it is unloaded by the consignee. The expense to the company of placing an empty car upon a team track for the purpose of being loaded with car load freight by the shipper, is not believed to be any greater than the expense incurred by the company in receiving from a connecting company and carrying to its proper place, there to await its final movement in the train, a car load of interstate freight. The service for each in the terminal is not precisely the same in character, but the cost of it cannot be greatly different; and the terminal service thus rendered to the interstate car load may well be even greater than in the case of a car load of State freight.

Even in the case of trans-state freight passing clear through the State, Mr. Bethard of the Missouri, Kansas & Texas Railroad Company testified there would be a terminal

cost at the point where it was received from the connecting road. (Record, Vol. II, pp. 1828-9.)

And he says that in the case of car load freight from New York to San Francisco, passing through Missouri over the line of the Missouri Pacific Railway Company, terminal expense would be incurred at three points in Missouri. (Record, Vol. II, pp. 1831-2.)

The testimony of Mr. Rainey of the St. Louis & San Francisco Railroad Company is substantially to the same effect. (Record, Vol. II, p. 1839.)

And Mr. Berger of the Wabash Company testified that freight received by his company, either at Hannibal or St. Louis, from one of its eastern connections, would be rebilled at those places. (Record, Vol. III, pp. 2699-2700.)

Mr. Miller, the General Manager of the Wabash Company, testified that a car load received by his company at St. Louis from an eastern connection would be hauled by a Wabash engine a mile to the Wabash yards and then placed in a Wabash train. (Record, Vol. III, p. 2853.)

And Mr. Doddridge testified that under the circumstances there would be no material difference in the terminal charges incident to State and interstate car load freight. (Record, Vol. II, pp. 1652-4; Vol. IV, pp. 3926-28.)

And Mr. Stith of the Missouri Pacific Railway Company testified to the same effect. (Record, Vol. II, pp. 1540-1.)

Mr. Ludlam testified quite fully upon this point. (Record, Vol. I, pp. 871, 1141-3); also, Mr. Taliaferro (Record, Vol. IV, pp. 4534-5.)

Mr. Hamilton also testified as to the result of his investigations. (Record, Vol. IV, pp. 4600-1, 4622-30.)

And the same method, of course, prevails in Kansas City or any other connecting point.

The Union Pacific Railroad Company has an eastern terminus at Kansas City. The Kansas City Southern Rail-

way Company has its northern and eastern terminus at the same place. All car load freight brought from the west or south over those roads, destined for points in Missouri, or from points east or north of Missouri, must of necessity be transferred at Kansas City to some other line. This transfer takes place in the Kansas City terminals, and is of the same general character as the transfer at St. Louis. This inevitably involves terminal expense in Missouri.

No witness, it is believed, on the part of the complainants who has offered his opinion as to the increased cost of handling State freight, has failed to mention as one of the reasons for his opinion that State freight must pay two terminal charges while interstate freight pays only one. In view of the evidence just referred to, an opinion based on such a reason naturally carries with it to the mind of the listener very grave doubt as to its value.

G.

THE QUESTION OF WASTE SPACE.

In support of opinions offered as to the increased cost of handling State freight, it is suggested that there is much waste space in the way trains.

It has been said elsewhere in this brief that the constant comparison is between way trains and through trains.

It is true that in the case of less than car load business there is frequent waste space in way trains. That is to say, the car is not loaded to its full capacity. But as the less than car load freight upon these way trains is interstate as well as State freight, the alleged loss of space cannot be charged wholly to State freight.

And so far as facts instead of opinions bearing upon the subject have been adduced in this case, car loads of State freight are heavier than those of interstate freight. The tonnage of the State car loads in Mr. Doddridge's Exhibit 8 (Record, Vol. III, pp. 2390-2) were 27 tons to the car, while that of the interstate freight upon the same trains was only 22½ tons. That is to say, the State car loads were, on the average, 20 per cent. heavier than the interstate car loads. The much exploited waste of space was due, then, to interstate rather than to State business.

But this is not all the light which this record throws upon the subject of waste space. Mr. Doddridge produced for the Missouri Pacific Railway Company a statement of the tonnage upon certain through trains leaving St. Louis on certain days. (Record, Vol. II, pp. 1589-91, 1769, Exhibit 15, Vol. III, p. 2402.)

Mr. Doddridge said of these through trains that "there was no less than car load freight carried in those trains." (pp. 1589-90.)

Mr. Doddridge was mistaken.

By another table introduced by him in evidence for another purpose, it appeared clearly that several of those identical through trains carried from eight to ten cars of less than car load freight. (Record, Vol. II, pp. 1871-8.)

The comment upon this showing, by Mr. Ludlam, one of the State's experts, was natural, pertinent, and leaves nothing to be said.

> "Q. Referring to the opinions which have been expressed here, that one reason for the extra expense of hauling freight on way trains is the waste space in them, how does this showing which you have been going over for the last two minutes as to the loading of these cars in these through trains, compare with the loadings of cars in the way trains, as to the waste of space in the cars?

A. It shows that the same conditions prevailed on the through trains as prevailed on the local or way trains. That is, that less than car load freight is hauled on the through trains as well as on the way trains. And, consequently, there would be lost space and a light revenue tonnage in comparison to the heavy dead tonnage that the trains would have to haul on the through trains as well as on the local trains.

Q. Does the weight in these cars which were loaded at St. Louis and transported on these through trains, as shown by these sheets, indicate that there was waste space in those cars?

A. Yes, sir. The average loading of all of these cars of less than car load freight forwarded on those Red Ball trains, the highest class of through trains, as I understand from the testimony, was, of course, only a small part of the capacity of the cars."

(Record Vol. II, pp. 1878-9.)

H.

THE STATE BUSINESS OUGHT NOT TO BE CHARGED WITH THE EXPENSE OF MAINTAINING TRACKS AND OTHER FACILITIES AT PLACES BETWEEN DIVISION POINTS.

It is asserted by witnesses who expressed their opinions as to the increased cost of the State business that one important cause for such cost is the maintenance of stations, side tracks and other facilities at places or many places between division points on the road. And oddly enough, the principal reason assigned for this by some of them is that the road was originally built as a State road, that these facilities were

originally intended to accommodate the State traffic, and this being the case, the expense of keeping them up should still be charged to the State traffic, although interstate business enjoys the benefit of their existence.

This serves to illustrate how everywhere in this record witnesses have been assiduous in searching for causes upon which to base their opinions of increased cost. Nothing has escaped them. And in their zeal they have permitted themselves to suggest the expense of maintaining these station facilities as one of the causes and giving for it the reason just referred to.

Mr. Willard, the vice-president of the complainant, says that "The road as it is now built was *primarily built* to take care of local business, and the *facilities built originally*, and which are in use now, are practically all necessary for the performance of this local business, even if there were no through business" (Record, Vol. I, p. 494), and therefore "the maintenance and the entire cost of a large proportion of the local facilities should, in my opinion, properly *all be charged* to the local freight business" (p. 495).

He further says that the side tracks at these local stations "constitute approximately 26 per cent of our business (mileage?) in Missouri; and the cost of maintenance should be *charged wholly* to the carrying on *of the local business.*" (Record, Vol. I, p. 495.)

He expressed the opinion that about 60 per cent of the freight business on his road in Missouri passed entirely through the State (p. 535), and therefore enjoyed no use of these facilities (p. 514). But Mr. Willard, in making this estimate, fell into a serious error of fact.

Mr. Willard gave his testimony October 24, 1906. In November, 1906, an investigation of the operations of his company in Missouri for the month of September, 1906, began and was completed in February, 1907. (Record, Vol.

I, p. 1067.) The record of that investigation was tabulated and is often referred to in this brief. It appears at Vol. II, p. 1414. It showed that instead of the through interstate freight being 60 *per cent.* of the whole, as supposed by Mr. Willard, it was *only* 27.62 *per cent.* in tons, less than half as much as Mr. Willard said; and that in ton miles it was only 34.51 per cent.

The question at issue being the relative cost of State and interstate business, obviously it was Mr. Willard's effort and commendable purpose to fasten upon the State business as large a part as the facts would justify of the expense of these station facilities, including maintenance of side tracks, station houses, wages of agents, employees, etc., and to relieve the interstate business of as large a part of those expenses as was, in his opinion, proper.

In juxtaposition with Mr. Willard's testimony as to the use of these station facilities by the interstate traffic, it is interesting and profitable to place the results of an actual investigation afterward made by the experts for the State, the results of which are not disputed. Upon Mr. Willard's railroad in Missouri there are 230 freight stations; 170 of them are agency stations; that is, stations where agents are kept. Sixty of them are what are known as "prepaid stations." A prepaid station is a place for the delivery of freight or the picking up of freight by trains where there is no agent to handle the business. The freight shipped from such a station is placed upon the platform and loaded by the freight train crew, and the billing is done at the next agency station reached by the train. The transportation for this kind of freight is paid for in advance. During the month of September, 1906, at every one of the 170 agency stations both State and interstate freight was handled. Five of the prepaid stations handled interstate freight only. Four of the prepaid stations handled State freight only. Twenty-

six of the prepaid stations handled both State and interstate freight. At 25 of the prepaid stations no freight business of either class was handled. It thus appears that of all the stations, both agency and prepaid, upon the complainant's road in Missouri, only four of them handled State freight only, while five of them handled interstate freight only. Practically, therefore, interstate business enjoyed in common with State business the facilities afforded by all of the stations upon Mr. Willard's railroad in the State of Missouri. (Record, Vol. I, pp. 1076-7; Exhibit 40a, Vol. II, p. 1440.)

Mr. Stith of the Missouri Pacific Railroad Company, who gave his estimate as to the increased cost of doing State business, assigned as one of his reasons therefor the fact that in his opinion a much greater charge should be made relatively against the State than against the interstate freight business on account of the expense incident to the facilities of the local stations, because the road was first built for the purpose of carrying on a purely local business. (Record, Vol. II, pp. 1517-19.)

But Mr. Doddridge, for the Missouri Pacific Railway Company, instituted an investigation for another purpose, of the business transacted at 88 stations upon the line of that road in Missouri, during the month of October, 1905, the stations, of course, being selected by himself, and none of them being large terminals or division points.

At four of those stations during that period no freight in less than car load lots, State or interstate, was handled. At all of the remaining stations, with one exception, less than car load interstate freight was handled. At 10 of the stations no car load freight, State or interstate, was handled. At all of the remaining stations, both State and interstate car load was handled. Of the total number of cars loaded with carload freight at those stations, 38 per cent. were

loaded with interstate freight. (Record, Vol. II, p. 1591; Exhibits 7 and 8, Vol. III, pp. 2388-92.)

And Mr. Miller of the Wabash Company offered as one of the reasons why he would charge to the State business more than its proportion of the expense of these local facilities the fact that they were built when the railroad was first constructed and that it was intended as a local railroad within the State. (Record, Vol. III, pp. 2863, 2896.) And he thought it right merely for the reason that the facilities were originally intended to accommodate strictly local business, to charge the State traffic with a much greater proportion of that expense, notwithstanding the fact that the facilities were used largely by interstate traffic; notwithstanding the fact that it subsequently appeared that during the month of September, 1906, at certain stations, not division points, on his railroad, more than half of the traffic in volume was interstate freight. (Record, Vol. III, Exhibit 28, p. 3362.)

And Mr. Gray of the St. Louis & San Francisco Railroad Company expressed substantially the same view. (Record, Vol. IV, pp. 3951-3; 4030, 4034.)

Thus is repeated again and again by some of the most intelligent witnesses for the complainant that a principal reason for charging an undue proportion of this particular expense to the State business arises from the fact that the road was built originally to accommodate purely State business, that these facilities were necessary for the transaction of that business; and that, therefore, the State business should bear that burden because years ago that business enjoyed the exclusive benefit of the facilities, notwithstanding the fact that at present the interstate business makes very large use of those facilities, and profits greatly by that use.

Surely, opinions as to cost, based upon such a consideration as this, cannot be regarded as helpful in the solution of this difficult problem.

I.

THE COMPARATIVE INSIGNIFICANCE OF THE LESS THAN CAR LOAD BUSINESS.

Much is said about the expense of handling the less than car load freight. Doubtless it is more expensive than the car load business because it is in numerous parcels, and because the loading and unloading of it is done by the railroad company, while that service for car load freight is performed by the consignor and consignee. But that element of expense is incident to less than car load interstate freight, as well as to State less than car load. The interstate must be loaded and unloaded in the same manner as the other.

Mr. Rainey of the St. Louis and San Francisco Railroad Company testified that the main increased cost of the local trains was because of the less than car load business and the time required for loading and unloading it. (Record, Vol. II, p. 1845.)

But the less than car load constitutes a *very small proportion* of the whole. In Record, Vol. II, pp. 1414-15, is found a tabulated statement of the freight operations of the complainant in Missouri for the month of September, 1906. The figures in the first column for the number of tons of less than car load are an evident misprint; they should be 35,488, instead of 55,488. It appears from this table that the total less than car load (both State and interstate) was *only* 5.68 *per cent.* of the whole in tons; in ton miles, only 6.10 per cent. And it is this inconsiderable portion of the whole vol-

ume of the business "peddled out," as Mr. Elliott says (Record, Vol. I, p. 430), which we are asked to believe is, in great part, responsible for the almost fabulous extra expense which, it is charged, attaches to the *whole volume of State business*, both carload and less than carload.

It also appears that in tons, State car load freight is 12.39 per cent. of the entire freight business of the company, and State less than car load is only 1.32 per cent. of the entire freight business. That is, of the entire State business, *only* 9.63 *per cent.*, in tons, is less than car load.

In tons, second class interstate car load freight is 55.52 per cent. of the entire business.

Less than car load, 3.15 per cent.

That is, of the entire second class interstate business, 5.37 per cent., in tons, is less than car load.

The proportion of second class interstate less than car loads to the whole of second class interstate is a little more than one-half the proportion of State less than car load to the whole of the State.

State less than car load is, in tons, 23.35 per cent. of *all* less than car load.

Second class interstate less than car load is, in tons, 55.9 per cent. of all less than car load.

All interstate (including both classes) less than car load is, in tons, 76.65 per cent. of *all* less than car load.

In ton miles, State less than car load is 15.9 per cent. of the total ton miles of all less than car load.

Second class interstate less than car load is, in ton miles, 59.3 per cent. of total ton miles of *all* less than car load.

All interstate less than car load is, in ton miles, 84.1 per cent. of the total ton miles of *all* less than car load.

The less than car load State freight is, in ton miles,

less than 1 *per cent.* of the total ton miles of the entire freight business.

It is true, then, that a part of the interstate business is less than car load; it is also true that the proportion of it is somewhat less than that of State freight. But the whole of this less than car load business, State and interstate, whether considered separately or together, is comparatively trivial in quantity.

The business of the Missouri Pacific Railway Company for October, 1905, tabulated in Record, Vol. III, p. 2407, shows not the same, of course, but a similar situation. This investigation did not separate the interstate business into the two classes. "Interstate" in this table embraces both "first class" and "second class" interstate. The less than car load was *only* 4.36 *per cent.* in tons, of the whole volume of freight; in ton miles, 6.45 per cent.

In tons, State car load freight is 23.20 per cent. of the entire freight business of the company.

State, less than car load, *only* 1.54 *per cent.*

That is, of the entire State business, *only* 6.22 *per cent.*, in tons, is less than car load.

In tons, interstate car load freight is 72.44 per cent. of the entire business.

Less than car load, 2.82 per cent.

That is, of the entire interstate business, 3.74 per cent., in tons, is less than car load, the proportion being about 60 per cent. of that existing in the case of State freight.

In ton miles, State less than car load is 29.4 per cent. of the total ton miles of all less than car load.

All interstate less than car load is, in ton miles, 70.6 per cent. of the total ton miles of all less than car load.

The less than car load State freight is, in ton miles, *less than 2 per cent.* of the total ton miles of the entire freight business.

See, also, Mr. Ludlam's testimony as to this tabulation. (Record, Vol. I, p. 930.)

It thus appears that this much-talked of less than car load business is, indeed, a scapegoat of very small size.

J.

THE OPINIONS OF THE WITNESSES FOR THE COMPLAINANT UPON THE QUESTION OF THE COST OF DOING BUSINESS ARE NOT CONCLUSIVE.

The names of some of these witnesses are well known names. Some of them are chief or prominent in the management of successful railroad properties. And there are others holding less conspicuous, but most responsible positions, who have deserved them, who have earned them upon their merits. That they are capable men and successful men must be admitted, and is fully conceded. It is only justice to them to concede it, and not only to concede it, but to cheerfully declare it. They are capable and successful men, because as a result of their efforts and management the properties committed to their charge, in whole or in part, have been able to pay the interest upon their bonded indebtedness, and perhaps a satisfactory dividend to their stockholders.

But the attention of the managers of any railroad system is directed to the ultimate result, that ultimate result being

the net profits from the operation of the system as a whole, including its entire territory, perhaps many states, including its entire operations, whether passenger or freight, whether State or interstate.

It has not been necessary for them, in their efforts to accomplish these results, to inquire whether it has cost more or less to transport in the same car one article of freight than another; much less to separate those articles into the two classes of State and interstate freight. It has not been necessary, or even useful, in their management of the properties, to inquire how much of the contents of a way train or of a through train is State freight or interstate freight. Their subordinates, in loading cars with freight, have regard only to the point of its destination. It is immaterial to them whether that freight may be State or interstate. It has not occurred to railroad managers to inquire as to the relative cost of transporting State and interstate freight. Such knowledge has been neither necessary nor useful to them in the operation of their properties. It is, therefore, no reproach to them that they disclose their want of information, or gross misinformation regarding facts, material to the solution of the problem now before the court.

But the opinion of any man, to be accepted, must appear to be based upon his knowledge of facts. If a witness, therefore, offers an opinion which, to be valuable, must be based upon his knowledge of facts, and his testimony discloses that he either has no knowledge of the facts or that his opinion is based upon what he supposes to be the fact, when the fact is quite otherwise, we naturally reject his opinion. We cannot accept opinions as revelations appealing to our faith. There must be some substantial and visible basis of actual fact to support them. We do not accept opinions without reasons for them. And the reasons must appeal to our intelligence and our understanding. If the reasons offered

seem far fetched, if their importance appears greatly magnified, we hesitate to regard them as adequate to support the opinion offered. In a matter of such great and general importance as that now presented to the court, if the issue on one side is supported principally by opinion evidence, it must be expected that the value of those opinions will be measured by the extent of the knowledge of material facts possessed by the witnesses who offer them.

It is therefore pertinent to examine this record with the view of scrutinizing the qualifications or want of qualifications of the witnesses to give opinions upon which a decree annulling the law of a State can properly be based. Because the decree of the court below *rests upon opinions and not upon facts;* opinions, in many instances, of witnesses who either disclaimed knowledge, or assumed to possess knowledge of material facts, as to which other evidence demonstrated they had no knowledge whatever; whose assumptions were not even approximations of the actual facts.

Mr. Willard, vice-president of the complainant, had no idea and no information upon which to base an idea upon the important question as to relative tonnage of State and interstate freight on way and through trains. (Record, Vol. I, p. 512.)

He did not know and had no idea of the average length of haul in Missouri (pp. 527, 531).

He thought that less than car load freight, destined for the west and received by his company at St. Louis from one of its eastern connections, would not be unloaded at St. Louis and reloaded into another car on his road.

But all the evidence shows to the contrary.

And yet Mr. Willard, with misinformation, or total want

of information regarding such material facts as these, does "not hesitate to say that in my opinion" the cost of doing State freight business "is not less than three times" that of interstate. (Record, Vol. I, p. 494.)

Mr. Elliott does not know the percentage of State freight on through trains, or on way trains (Record, Vol. I, pp. 431, 481, 483), or the percentage of less than car load business (p. 438).

Darius Miller, vice-president of the complainant, who gave his opinion that the cost in the State freight business was three times as much as in interstate, had no definite knowledge as to the proportion of State and interstate freight in way trains. (Record, Vol. I, p. 608.)

Mr. Sturgis, the General Auditor of the complainant, who had testified that the State business costs three to seven times as much *in proportion to revenue*, as the interstate, said he knew nothing about the relative proportion of rates on State and interstate traffic in Missouri. (Record, Vol. I, pp. 368-9.)

H. G. Clark, superintendent of one of the divisions of the Missouri Pacific Railroad, who had testified that in his opinion the State freight cost was four or five to one, had no opinion of the relative volume of the different classes of freight on his road, or of the relative proportion of car load and less than car load lots, but assumed that the way trains carried a larger per cent. of State than of interstate freight. (Record, Vol. II, 1632). He would not even assume, for the purposes of a question, that the way trains carried more interstate than State freight (pp. 1633, 1639), although the performance of trains on his own road showed 63 per cent. interstate and only 37 per cent. State freight (Record, Vol. II, pp. 1589, 1531), and although, as appeared later by the testimony of Mr. Peabody of the Santa Fe Company (Exhibits 41 and 42, Vol. V, pp. 4935-8), that of the contents of

way trains 69.8 per cent. in tons and 83.3 per cent, in ton miles was interstate freight.

Mr. Fisher of the Missouri Pacific Railway Company, who says it costs two to six times as much to earn a dollar in State as in interstate business, does not even take into consideration the rates on the two different classes of freight at all. (Vol. II, p. 1753.)

Mr. Bethard, Superintendent of Transportation of the Missouri, Kansas & Texas Railroad Company, testified that it costs four or five times as much for State as for interstate business.

It is interesting to inquire how much knowledge he possessed of material facts.

He said that 75 per cent. of the State freight business would be on the way trains and 25 per cent. on the through trains. (Record, Vol. II, p. 1825.)

But the tests of Mr. Peabody of the Santa Fe Company showed that the way trains carried only 16.7 per cent. of the total State freight, and that 83.3 per cent. of it was on through trains. (Peabody's Exhibits 41 and 42, Record, Vol. V, pp. 4935-8.)

He thought that 98 per cent. of the business on through trains was interstate freight, and 2 per cent. State freight (p. 1826).

But in Doddridge's through trains, 7 per cent. was State and 93 per cent. interstate business. (Vol. II, p. 1589.)

He thought that of the freight on the way trains 95 per cent. would be State freight and only 5 per cent. interstate (p. 1826).

But in fact, on the Doddridge way trains it was 37 per cent. State and 63 per cent interstate. (Record Vol. II, pp. 1589, 1621.)

And on the Peabody way trains, State freight was 30.2 per cent. and interstate 69.8 per cent. (Record, Vol. V, pp. 4935-8.)

He thought 40 or 50 per cent. of the freight on way trains was less than car load. (Record, Vol. II, p. 1826.)

In fact, it is only 4 per cent (p. 1618).

And the opinion of this witness as to the extra cost to be charged to State freight is because of the great preponderance of State freight carried on way trains and of interstate freight on through trains. (Record, Vol. II, p. 1827.)

Mr. Rainey of the St. Louis & San Francisco Railroad Company was of opinion that it would cost "three or four times as much" to do State freight business. And yet this witness proceeded upon the assumption that 90 per cent. of the business on way trains was State freight, and that 40 per cent. of their entire tonnage was less than car load (Record, Vol. II, p. 1843.) While we have seen that according to actual tests by Mr. Doddridge, only 4 per cent. of the way train tonnage was less than car load (p. 1618), and that of car load freight only 37 per cent. was State freight (p. 1589), and according to Peabody's tests, only 30.2 per cent. of the tonnage of the way trains was State freight.

Mr. Miller, General Manager of the Wabash Company, said that the extra cost of doing State freight business in Missouri was practically the same on the Wabash, the Missouri Pacific and the Burlington railroads. (Record, Vol. III, p. 2831.)

He estimated that 25 per cent. of the total ton miles of freight in Missouri was State business, while actual investigation made later on the Burlington (complainant's) road showed that the State freight percentage of ton miles was only 8.67 per cent (Exhibit 36, Record, Vol. II, pp. 1414-15), and a similar investigation on the Missouri Pacific road showed the State freight ton miles to be only 13.98 per cent. of the whole. (Exhibit 19, Record, Vol. III, p. 2407.)

Mr. Miller thought the interstate business at Carrollton, one of the towns between division points on his own road, was

a small part (Record, Vol. III, pp. 2865-6), while later investigation demonstrated that the interstate tonnage handled at that place was 5/6 as much as the State, or more than 45 per cent. of the whole. (Record, Vol. III, pp. 2999-3001, Exhibit 28, Vol. III, p. 3362.)

He says that of the tonnage on the way trains the interstate freight is a small part (Record, Vol. III, p. 2268), and his estimate of increased cost is upon the assumption that by far the larger part of it is State traffic (p. 2896).

How greatly mistaken he was upon this point has already been seen.

He did not know the average haul in Missouri of either class of freight (p. 2871). And he thinks it right to charge to the State business a large part of the expense of the local stations and their facilities, because, as he says, "only a very small part comparatively is interstate business at the local station" (Record, Vol. III, p. 2877), while subsequent investigation by the State's experts disclosed the fact that at five stations on his road (none of them division points) the interstate freight handled in September, 1906, was 60 per cent. of the whole, or, deducting that part of the St. Charles tonnage, consisting of manufactured cars, it was 53.34 per cent. of the whole. (Record, Vol. III, pp. 2999-3001, Exhibit 28, Vol. III, p. 3362.)

Mr. Miller estimated the average tonnage of his through trains at 750 *tons* each, and his way trains at not to exceed 100 tons each. (Record, Vol. III, pp. 2913-14.)

Mr. Miller was greatly mistaken.

Mr. Taliaferro, one of the State's experts, afterwards investigated the subject. The wheel reports for the through trains for the last ten days of September, 1906, were furnished to him by Mr. Forsythe, the railroad company's Superintendent of Transportation. He found that the average tonnage of one those through trains for ten days was *only*

351 *tons;* of another one, *only* 246 *tons.* His testimony shows the loading of many others of the through trains during that period. The average tonnage of all of them was *only* 300 tons, instead of 750, as Mr. Miller thought. Those were east-bound trains.

He also investigated the west-bound through trains. Their average tonnage was 270 tons.

And the average tonnage of all the through trains, both east and west bound, was 283 tons. He found no train that carried as much as 750 tons; the heaviest was 418 tons. (Record, Vol. III, pp. 3003-3007.)

A blue print, known as "Summary of Operating Statistics by Accounting Divisions, for the year ending June 30, 1906," had been offered in evidence by the company (Record, Vol. III, p. 2912, Exhibit 12, p. 3336). It disclosed the average tonnage of all trains, way and through, for the year, over certain portions of the line, from which Mr. Taliaferro drew the irresistible inference that the average tonnage of the way trains must be at least 200 tons (Record, Vol. III, pp. 3011-12), instead of 100 tons, as estimated by Mr. Miller.

Mr. Tyler, General Superintendent of 2,000 miles of the St. Louis and San Francisco Company's mileage, thought 80 per cent. of the tonnage of way trains was State freight. (Record, Vol. IV, p. 4136). And that of the freight handled on through trains, only from 1 to 3 per cent. is State business (p. 4137).

How far from the actual facts these estimates were, is discovered by Mr. Hamilton's investigation of through and way trains on Mr. Tyler's own road, the results of which are referred to elsewhere. (Record, Vol. IV, pp. 4608-17).

And Mr. Tyler says that it is upon such estimates as these that he is led to his opinion as to extra cost (p. 4138).

Mr. Whitenton, who, for several years, was the superintendent of the Chicago, Rock Island and Pacific Railroad in

Missouri, testified that on the revenue basis, it would cost twice as much to do State business as interstate; that is, it would cost about twice as much to earn a dollar. (Record, Vol. IV, pp. 4157-8.) This statement involved, of course, the consideration of the relative revenue derived from the two classes of business. But apparently unconscious of the sublime paradox resulting, he says, almost in the next sentence, when asked about the relation between State and interstate rates on his road: "I don't know a thing about rates" (p. 4158).

Mr. McPherson of the Missouri Pacific Railway Company said that the relation of the State less than car load traffic to all the State traffic was greater than the proportion of interstate less than car load to the total interstate in the ratio of about four to one on the ton mile basis of calculation. (Record, Vol. IV, p. 4292.)

Mr. McPherson doubtless believed this statement. And manifestly it was made to direct attention to the fact that the expensive less than car load business was found in very much larger proportion in the State than in the interstate business.

That it is found in larger proportion is true. But that the proportion is not so large as Mr. McPherson supposed is also true.

On the Burlington road in Missouri, the percentage of less than car load State ton miles to the total State ton miles is 11.1 per cent. The percentage of less than car load interstate ton miles to the total interstate ton miles is 5.6 per cent. (Exhibit 36, Record, Vol. II, pp. 1414-15.) The State proportion of ton miles is, therefore, a little less than twice as large, instead of four times as large, as Mr. McPherson thought.

Upon Mr. McPherson's own road, the Missouri Pacific, the percentage of less than car load State ton miles to the

total State ton miles is 13.7 per cent. The percentage of less than car load interstate ton miles to the total interstate ton miles is 5.3 per cent (Exhibit 18, Record, Vol. III, p. 2407), the State proportion of ton miles being only about 2.6 times as large as the interstate proportion, instead of four times as large as Mr. McPherson said.

Mr. McPherson said that in State car load traffic, the loading is lighter than in the interstate car load traffic. (Record, Vol. IV, 4330.)

But Mr. Doddridge made an examination of the business transacted at 88 stations upon Mr. McPherson's railroad, and produced a tabulated statement of the result, which was introduced in evidence by the Missouri Pacific Railway Company. (Record, Vol. II, pp. 1591, 1620, Exhibit 8; Vol. III, pp. 2390-2.) From this it appeared that the State car loads were the heaviest. State car load freight averaged 27 tons to the car, while interstate car load freight averaged only 22½ tons to the car. (Record, Vol. II, pp. 1881-2.)

These matters, in respect of which such glaring want of knowledge was thus displayed, are principal factors whose full comprehension and consideration are indispensable to any just conclusion upon the question of expense. Opinions ventured in the absence of such knowledge cannot be regarded as thoughtful estimates, but as mere haphazard conjectures without persuasive force.

K.

THE TOTAL FREIGHT EXPENSES OUGHT NOT TO BE DIVIDED BETWEEN STATE AND INTERSTATE BUSINESS UPON THE BASIS OF GROSS EARNINGS.

As has been already stated, the complainant presents a certain sum as the expenses of all its freight business in Missouri, both State and interstate. This sum is undivided. It is not practicable in the management of the business to keep the account of those gross freight expenses accurately divided between State and interstate freight business. No attempt to keep them separately has been made by the company. It was not necessary in the management of the railroad. No complaint is made by the State officers that the accounts were not so kept that the interstate expense might appear separate from the State expense. The State officers concede freely that it was not only unnecessary, in the ordinary maanagement of the business to so keep the accounts, but that it would have been impracticable to do so. Not only would it have been impracticable, but, in respect of some part of the expense, it would have been impossible to separate it accurately between State and interstate business. These accounts were kept as they were in the ordinary course of business, to preserve such records of its transactions as the stockholders and directors of the company might wish to inspect, in order to discover the causes which, at the end of the year, had produced, or failed to produce, dividends. The accounts were not, and could not, be kept in contemplation of possible litigation or controversies such as are involved in the case at bar.

Conceding therefore for the moment, that the statement by the company of its revenue from the State freight business and from the interstate freight business is correct, and that its statement of the aggregate expenses of both classes of freight business is also correct the paramount question of fact is, how much of this aggregate expense is to be charged to State freight and how much to interstate freight. Because this aggregate expense has not been apportioned in the accounts of the company as kept, the apportionment is to be made by the court.

The Circuit Court, in apportioning these expenses, adopted and applied the method which, in the record, is frequently referred to as the "revenue theory." This is error, of which the State officers complain here. It is an error which it is sought to correct by this appeal. The State officers contend that this method of apportioning undivided expense is vicious, illogical and wholly indefensible. Its chief if not its only merit is its simplicity and the facility of its application.

The revenue from a certain service has no relation to the cost of that service.

It is well understood that railroad companies, in fixing rates for the transportation of freight, do not consider the question of cost. This fact is disclosed by the testimony of witnesses in many places in this record; among others that of Mr. Crosby (Record, Vol. I, p. 588), and of Mr. Hale (Record, Vol. IV, p. 4058), and of Mr. Doddridge (Record, Vol. IV, pp. 3829-31). Indeed, it is a matter of common knowledge.

For example, there are five lines of railroad between Kansas City and St. Louis, both of them cities in the State of Missouri. Doubtless the rates for the transportation of the same class of commodities from Kansas City to St. Louis are

the same on all these lines. It is, however, manifest that the cost of performing that service cannot be the same for each of them. There may be a low rate for transporting one class of freight and a much higher rate for the transportation of another class. But the actual cost to the carrier for the service rendered by it may be, and often is, approximately the same.

Again, this record discloses the fact that the average gross revenue received by the railroad company for transporting a ton of State freight one mile is very much more than that for transporting a ton of interstate freight one mile. This takes into consideration the entire freight business of all kinds done by the company in the State.

In the case of the complainant, the Chicago, Burlington and Quincy Railroad Company, the average revenue per ton mile for State freight is more than twice as large as that for interstate freight. (Exhibit 36, Record, Vol. II, p. 1414.)

In the case of the Missouri Pacific Railway Company, the disparity in the matter of average revenue per ton mile is still greater. (Exhibit 19, Record, Vol. III, p. 2407.)

Therefore, if it happens that the average revenue from State freight is exactly twice as great, the "revenue theory" for its first leap immediately jumps to the conclusion that the cost is necessarily twice as much; and then adds to this preliminary result in its process a still further amount.

The statement of such a proposition contains its own refutation.

This was the method pressed upon the court below by the complainant at the threshhold of this litigation, and continuously and persistently urged until the final decree. It was the basis upon which that decree was rendered.

On the other hand, the State officers contended that the true method of dividing the gross expenses was to ascertain as nearly as possible the actual cost per ton mile of handling

the freight in each class of business, entirely irrespective and regardless of the revenue derived from the service. To reach that cost as nearly as possible was the effort and the aim of the experts for the State. Their view upon this subject is often referred to in the record as "the ton mile theory." And the contention of the appellants in this court upon that subject is that the results obtained by its application are more approximately correct than can be reached in any other manner.

At this point it is not improper to refer briefly to the qualifications of the experts employed by the State and upon whose investigations and whose testimony the State very largely relied. They were Charles S. Ludlam, A. P. Taliaferro and T. A. Hamilton. They were not, as were many of the witnesses for the complainant, vice-presidents or general managers or superintendents of successful railroad systems. They were and had been long connected with the well-known firm of Haskins & Sells, chartered accountants of the city of New York, with offices in other important cities. Each of them had enjoyed some actual practical experience in the operation of railroads. But that experience was not large, nor had they occupied responsible positions in the management of important railroad systems. Their actual experience, however, was sufficient to afford them a very clear, practical knowledge of the general methods of railroad companies in the handling of freight.

In addition to this, both Mr. Ludlam and Mr. Taliaferro had the advantage of a very large personal experience in the methods pursued by railroad companies in the keeping of their accounts, resulting from their regular examination and audit of the accounts of some of the most extensive railroad systems in the country. And besides, in their employment by the State in this litigation, their time and that of their assistants, was occupied for months in the investigation of

the accounts of the railroad companies, parties to the litigation, and of their methods of handling business. They made the situation the subject of prolonged, serious and intelligent study. Facts testified to by them were the result of actual investigation. Opinions offered by them were based upon these facts and upon their knowledge of railroad operation gained by previous experience and close observation of the general methods and the details of railroad management pursued by many of the leading railroad companies of the country, as discovered by them in their examination of the accounts of those companies.

The qualifications of Mr. Ludlam for this work are stated in Record, Vol. I, pages 852-6, 939-41, Val. II, pages 1852-7, 2010-12, Vol. III, pages 3034-8.

The qualifications of Mr. Taliaferro are stated in Record, Vol. I, pages 888-90, Vol. II, pages 2188-90, 2203-5, Vol. III, pages 2950-3.

The qualifications of Mr. Hamilton are stated in Record, Vol. I, pages 1064-7, Vol. II, pages 2168-70.

It is not too much to say that considering their qualifications, their fitness for the work, the knowledge of actual facts acquired by them; considering their testimony in this case, not only as respects its substance, but the intelligence, fairness and candor with which it was given, the opinions of Mr. Ludlam and Mr. Taliaferro upon this important question are entitled to the gravest consideration.

They presented their views in respect of this important question before the Master, and at the hearing, on various occasions, giving the reasons why, in their opinion, expenses ought not to be divided upon the basis of earnings, and also the reasons why, in their opinion, the only correct method of ascertaining the expenses of the State freight business was to determine, as nearly as possible, the cost per ton mile of handling such business.

As the question is one of crucial importance, it is deemed proper at this point to reproduce the testimony of these witnesses in their own language.

Mr. Charles S. Ludlam testified:

"Q. Mr. Ludlam, I will get you to state, from your experience, both your connection with railroads and railroad accounts, and your experience as an accountant and auditor of accounts, including your experience in the examination of the books and papers of the Wabash and the Missouri Pacific railroads for the purposes of this litigation. What unit, in your judgment, affords the closest approach to accuracy, as to either cost or revenue in the handling of freight?

A: In my judgment the best unit known, and I think it is generally so recognized among railroad men, is the per ton per mile unit.

Q. Some of your exhibits here, at least some of them, are based upon the ton mile, both as to cost and earnings as the unit. Is that the reason you have taken that as the basis of a number of these computations, that you regard it as the best attainable basis to work on in ascertaining cost and revenue?

A. Yes, sir.

Q. Do you know, from your experience and associations with railroad managers and railroad accountants, and your auditing of railroad accounts, the accounts of other railroads, whether that is a recognized and approved unit in railroad circles.

A. That is the generally recognized unit, yes, sir."

(Record Vol. I, 1160-1.)

"A. I would like to make that very clear—and I do not think I can make it too clear—that the revenue has no possible relation to the cost. It costs the company just as much to haul a ton of sugar a mile in Missouri, whether that sugar originates in St. Louis or whether it originates in New York. And the revenue in Missouri is twice as

much for hauling it that mile as the revenue on the sugar that originates in New York that is hauled one mile in Missouri. But the cost of actually hauling that ton of sugar a mile is the same in both cases. And the mere fact that the revenue is twice as much in one case as it is in the other case does not in any way affect the cost per ton.

Q. That is to say, in ascertaining the cost, the question of revenue should not enter into it, in your judgment?

A. Absolutely not.

Q. The cost has nothing to do with the revenue?

A. They are two separate and distinct factors. Cost has no more relation to revenue than any two things that are entirely separate and distinct.

Q. So if it actually costs, on any theory you figure it out, three times as much to do the State business as to do the interstate business, it should not be considered so far as it affects the question of revenue?

A. The revenue may be ten times as much, but they have no relation to each other.

Q. The cost must be determined as something separate and distinct and apart from the revenue?

A. Unquestionably. I would like to illustrate that by a little example I have here.

If you take two tons of freight, each one moving a mile, and one of those tons is State freight, and, for the purpose of illustration we will assume it earned ten cents for moving that mile. The other ton is a ton of interstate freight, which was moved one mile, and we will assume that it earned five cents for moving that mile. That would make your total earnings fifteen cents. The expense, we will assume, for hauling those two tons one mile, both tons of freight being of the same class, would cost identically the same, say ten cents. If you take that expense of ten cents, however, and divide it on the basis of revenue, you would apportion two-thirds of the total expense against your ton of State freight, or six and two-thirds cents, because the State freight earned two-thirds of the total revenue of fifteen cents. And if the total expense

was ten cents, and you apportioned it on the basis of revenue, you would apportion two-thirds of the expense to the State business, which would make the expense for hauling that ton of State freight six and two-thirds cents, as compared with the expense of hauling that ton of interstate freight, three and one-third cents.

Now, there you get a condition right away where it costs you twice as much to move that ton of State freight a mile as it costs you to move a ton of interstate freight a mile, although they both moved under exactly the same conditions, possibly in the same car, and over the same track.

That is the result of apportioning it on the basis of revenue.

Now, if you take it on the three-times basis; that is, three times in proportion to revenue, the State freight earnings being ten cents and the interstate earnings five cents, you would multipy your State earnings by three, which would give you thirty for the State as against five for the interstate. That worked out to a conclusion would result in that ton of State freight costing you 8 4/7 cents for moving it a mile, as compared with a cost of 1 3/7 cents for moving another ton of exactly the same kind of freight, perhaps in the same car, a mile. The expense in the case of the State freight, 8 4/7 cents, would be exactly six times the expense of the interstate, which figures out 1 3/7 cents.

Now, then, if you go still further and assume it costs six times in proportion to revenue, the State revenue being still ten cents, multiplying that by six gives you sixty. The interstate revenue remains the same, five cents. If you apportion your expenses on that basis, the total expense of moving those two tons one mile each, ten cents, you would have to apportion 12/13 to that ton of State; or, worked out, the ton of State freight would cost 9 3/13 cents for hauling it a mile, as compared with a ton of interstate freight, costing 10/13 cents for hauling it a mile; although it may move in the same car, and is the same class of freight, and moves over the same track.

In that case, where you say the expense is six times in proportion to revenue, you are apportioning to the State expenses twelve-thirteenths of the total cost of moving those two tons one mile.

And that is not an exaggerated case, because I start out with a revenue of ten cents for the ton mile of State freight as compared with a revenue of five cents for a ton mile of interstate freight. That would make the State revenue just twice the interstate revenue. Exhibit 19 shows that taking all the State freight into consideration, and all the interstate freight into consideration, the company received more than twice as much per ton per mile for the State freight as it did for the interstate freight.

Mr. Ladd:

Q. Assuming that the revenue for performing certain services for State freight is twice as much as the revenue for performing the same service in the case of interstate freight, what does it mean to say that the cost of handling State freight is seven times as much as the cost of handling interstate freight in proportion to revenue.

A. It means that you are assuming that the cost of moving the State freight is fourteen times as much per ton per mile as for moving the interstate freight.

And the point I would like to illustrate is, that where the service is the same, there can be no difference in the cost. The point of origin of the freight can have no effect on the cost as I see it, although where the service is the same the revenue is not the same, by any means.

Q. Take a car load of salt, and a car load of sugar, both in barrels, ordinarily, which would bear the higher rate for transportation?

A. The sugar would run from double to more than double as much as the salt, for the same distance, and the same weight.

Q. Suppose it is twice as much, and there is the same weight in the car, and that it is in barrels, and although both car loads are shipped from St. Louis to Jefferson City, and go into the same train —is that an illustration of the proposition that the

revenue received has no relation to the cost of the services?

A. Yes, sir.

Q. The company would get twice as much for hauling that car load of sugar as it would for hauling that car load of salt?

A. Yes, sir.

Q. And the expense is exactly the same in both cases?

A. Yes, sir. I would like to say, before I get away from that—I should like to qualify that by saying that when I say the expenses are exactly the same, I mean that the only possible difference in the cost is the liability which the company assumes for the value of the two shipments, the sugar being more valuable than the salt. But the total loss and damage paid by the company are such a very small per cent. of their gross earnings that when you come to consider the cost per ton per mile, it almost vanishes."

(Record Vol. I, pp. 1170-2.)

Upon cross-examination he said:

"Q. Now let us get down to the question of comparison, because I am simply dealing with it from the standpoint of a fair way to compare the rates.

Your system of simply arriving at the per ton per mile is a system of averaging and placing practically everything on a level, isn't it?

A. Well, that is one way of expressing it.

Q. Isn't that a fair way of expressing it?

A. Hardly.

Q. You do not distinguish between the commodities?

A. I would say, I think rather it reduces it to a common unit that permitted of intelligent comparison.

Q. You call it "common unit" and I call it "reducing thing by a system of averages to a common level," and in ordinary parlance that expression is not far out of the way, is it?

A. I like my own better.

Q. I can understand mine better, is all.

Now, the result is, that when you do reduce it down to the ton per mile you have taken and averaged all the commodities regardless of their character. You have simply had the number of miles and the number of tons hauled, and out of that you get an entire average, don't you?

A. With the exception that we separate, of course, State and interstate, and car load and less than car load.

Q. I know that is a subdivision you make, because in each class you find out the same way, whether car load or less than car load, and whether State or interstate. What you do as to the commodities, regardless of the character of the commodities, regardless of the rates you get on the commodities, what you do is to get the total number of miles, the total number of tons, and the total amount of revenue received?

A. Yes, sir. What we try to do is to reduce the interstate car loads to a unit that permits of comparison with the State car loads. And the same way with the interstate less than car load and the State less than car load.

Q. But after all, it is adopting an average regardless of the commodities, regardless of the difference in the amounts you receive, isn't it?

A. Of course, that includes all the car load shipments in the interstate business, and it also includes all the car load shipments in the State business. In other words, it puts all the car load State business down to one figure and all the interstate car load business down to another figure.

Q. Let us take it with that limitation, because that is the way you prepared your statement; you have subdivided between car load and less than car load and between State and interstate?

A. Yes, sir; but the point I want to make is this: whether it is inequitable, if you please, to compare all the car loads, or to reduce all the car loads to one unit, it becomes equitable when the same system is followed in both State and interstate, for the reason that the same variation will

exist between the car load business in each class of business.

Q. To make my statement more specific, in less than car load you are ascertaining for State business, and also for interstate business, the rate you received per ton per mile, and that reduces things to a common level upon the basis of an average, regardless of the character of the commodity that is carried, doesn't it?

A. You mean both State and interstate?

Q. Yes. Regardless of their character.

A. To a common unit, regardless of the character, in both State and interstate.

Q. And regardless of the amount received on one particular commodity as against another. That is not taken into consideration, is it?

A. I think it is to the extent you will find both classes of commodities in both the State and interstate. The State does not have one particular class of commodities and the interstate another particular class of commodities, but they both average the same.

Q. But let us confine ourselves to less than car load lots. The fact that upon wheat you get one price and upon some other commodity you get another amount of revenue, that is not taken into consideration in your calculation at all?

A. That is not a very good illustration of less than car load lots.

Q. Well, take something else. Any commodity you want.

A. Take coffee and dry goods. You will find both coffee and dry goods in car loads and less than car loads.

Q. Certainly. But reducing it down upon one commodity you get a higher rate than upon another. That does not enter into it, except you have the sum total received?

A. On both classes, yes, sir.

Q. So you said before, in reducing to a ton mile basis you did not take into consideration, in this system of averages, the amount of waste space in the car, did you?

A. Not in either case.

Q. The ideal way, Mr. Ludlam, if it were practicable, or if the railroads kept their accounts that way, with this lawsuit in view, would be to keep track of each car, so as to have the kind of commodity and the vacant or unused space in the car, wouldn't it?

A. Yes, sir.

Q. That would be the ideal way?

A. Yes, sir.

Q. And without that we have all this system of averages and theorizing?

A. Now right there I would like to say that the same ratio of difference, however, must exist in each class of commodities that is shown by the total of all the commodities in each class. That is to say, that if the less than car load State averages twice as much per ton per mile, there must be a preponderance of the articles that are carried in less than car load business both State and interstate, that average higher proportionately in the State business than they average in the interstate business.

Q. In the final analysis, what we get down to, when you figure it your way, it is a system of averages, depending largely upon theoretical calculations, isn't it?

A. It is reducing the business to a common unit, upon an absolute tabulation of the transactions of the company. It is not theorizing in any sense. It is getting just as far away from that as possible.

Q. It is calculating upon a system of averages without taking the actual facts into consideration?

A. It takes all the actual facts into consideration. The amount hauled, the weight, the distance hauled, and so forth.

Q. You have just said you did not take those things into consideration.

A. If I did, I made a mistake—

Q. Let me go back to that.

A. Let me explain that, please. What I said was not taken into consideration, is the waste space.

Q. Let me see if the other thing is not true, because I did not think we misunderstood each other. We may differ as to what would be the right method of comparing.

Given the number of tons of less than car load freight; the number of miles that the less than car load freight was carried; the lump sum of money received for all less than car load freight, you could get your calculation upon the basis that you figure it without any other consideration; and that is the only way you get it?

A. And a separation into State and interstate.

Q. Then I will separate my question: in the State freight given all the tons that there are of less than carload freight, the total number of miles that the less than car load State freight has been carried, and all the money in a lump sum, without any division, that you have received for the less than car load State freight, your example is just one of division, isn't it?

A. Yes, sir. You get the average rate per ton per mile of State less than car load business from those figures.

Q. Is there any difference between us? That you did not, in arriving in your calculation, take into consideration the commodity or the lost space occupied in one car than in another. Does that enter into the calculation?

A. The space does not.

Q. Does the other thing?

A. The weight does.

Q. Only in the total number of tons?

A. Only in the total number of tons.

Q. That is as far as it goes?

A. Yes, sir.

Q. Now, coming back to my original question, with all this light before you, your opinion still is, notwithstanding you arrive at it in that way, it is fair, upon that theory, to compare the revenue received from the interstate as from the State freight; and you ought not to compare, based upon extending the State rates for a similar distance, as to what you receive?

A. My judgment is that the comparison

should be made upon the revenue per ton per mile."

(Record Vol. I, pp. 1185-8.)

And again:

"Q. You stated repeatedly during your examination that the question of revenue does not enter into this thing at all?

A. Absolutely not at all, into the question of cost, it has not the slightest relation to it.

Q. The cost should be ascertained in the best way possible?

A. Yes, sir.

Q. The ton mile is not the question; the revenue is not the question; the thing to be desired would be to ascertain the actual cost, if you could ascertain it in any way?

A. In our judgment, the ton mile basis is the only way in which you could ascertain it.

Q. You started to ascertain it on the ton mile basis?

A. We tried to do so.

Q. But on that basis, and with your figures, wherever you get, we have to double the figure with which you multiply, every time, to get you even upon that basis with us, upon the ton revenue basis, don't we?

A. Yes, unquestionably.

Q. Why is that so?

A. If you earn twice as much upon one ton of freight, which is State freight, as you do upon another ton of freight, which is interstate freight, if you want to show that the relation of cost to revenue is the same in both cases, you have immediately got to assume that the State business costs twice as much as the interstate, in order to get even.

Q. Now, then let us take it upon the tons, because it does strike me that besides being a simple way of arriving at the result, it is a little remarkable that when you deal with the thing upon the question of tons it comes out just the same, for practical purposes, as when you deal with it on

the question of revenue; and yet your multiple has to be doubled when you deal with it on the ton mile basis.

A. It would not be strange if you keep in mind that the revenue is as much and the haul only one-half as much.

Q. I am giving you the question irrespective of revenue, where you have the total number of tons carried, State and interstate.

A. I said—

Q. I will state in passing that in my mind the two ways you have figured it out come out practically the same; and with the other way, your way of figuring, it comes out only one-half?

A. As a general proposition, there are a great many wrong ways, and only one right way to do a thing."

(Record, Vol. I, pp. 1189-90.)

And further:

"Mr. Hagerman: Let us take the question of station and yard service. There is a fixed expense there, isn't there?

A. Yes, sir.

Q. Dealing, as you say, from the standpoint that the expense must not be coupled with revenue in any way whatsoever, what does the length of the haul have to do with the station or yard service?

A. Well, I should imagine, Mr. Hagerman, and I think even an amateur could realize that, that a car going from New York to San Francisco would use a great many more yards and have a great many more expenses than a car going from St. Louis to Sedalia. Therefore, I should think the length of the haul would have a vast amount to do with the yard and station service.

Q. I can see how it would be possible, taking the State of Missouri, running clear across the State and running across several divisions, the fact that it crosses those divisions would cut some figure; but when we do not get the use of any of the terminals at the division, what difference would it make whether the car went from Pacific Junction

to East St. Louis, or went from Pacific Junction to Alton, Illinois. They would cross the division point once.

A. In the State of Missouri.

Q. In the State of Missouri they would cross once?

A. Yes, sir; and in that case the terminal expense of the State and interstate would be identical.

Q. Give me another divisional point, out in the center of the State, Jefferson City, for instance.

A. Yes, sir.

Q. What difference does it make whether the haul started at the first station west of the eastern division point and stopped at the first station east of Sedalia, next to the division point; or, whether it started at the closest point east of Jefferson City and stopped at the closest point west of Jefferson City?

A. I do not think it would make any difference. I might express that by *anything* that where a movement was within the terminals, there would be no difference in the cost.

Q. Regardless of the difference in the haul?

A. Yes, sir; provided it was within the terminals.

Q. And yet you make an ironclad rule upon your basis of calculating the cost upon the ton mile basis, which must result in dividing my figure we make into two, because of the difference in the average length of haul, don't you?

A. No, sir; I double the terminal and yard service in estimating State expense, because the State freight moves only half as far as the interstate.

Q. Per ton per mile?

A. I double it per ton per mile because it moves only half as far.

Q. Take general expenses: What difference does the general expenses make, whether you run the train ten miles or one hundred miles?

A. I don't think it makes any difference per ton per mile.

Q. Then why ought the ton per mile basis to be applied to an expense of that kind?

A. Because I think that is the surest basis you can apply.

(Record, Vol. I, pp. 1192-3.)

"Q. What is the necessity of introducing that extremely complicated calculation?

A. The necessity to my mind seems to be very urgent. If you take your total number of tons and divide it into your total expense, you assume right at the start, that it costs the same to haul a ton 52 miles, which is the average distance the State freight moves, as it does to haul a ton of freight 105 miles, which is the average distance the interstate freight moves.

You would start immediately on a false premise, if you simply divided the number of tons into the expenses.

Just as I attempted to show in my illustration, it does not cost the same to haul a ton of freight one mile as it does to haul a ton of freight 1,000 miles. You must reduce it to a common unit, and after you have obtained that common unit, which is so much per ton per mile, you can say this first ton was moved a mile, and at that cost per ton per mile it would be so much. The second ton was moved that much, and at that cost per ton per mile it would be one thousand times that much. You cannot simply divide your tonnage into your expenses when your elements are entirely different, one being more than double what the other is.

You must get down to a common unit to get a basis that means anything. You might as well say you could run a grocery store and sell kerosene and apples, and that you could take the total number of barrels of each you sold to find out what you realized from your kerosene and your apples, though they are entirely different articles. One goes 52 miles and the other goes 105 miles."

(Record, Vol. I, p. 1195.)

And on further cross-examination:

"Q. Your idea is, that there is not more money made on the long haul business than on the short haul?

A. No, sir; not per ton per mile.

Q. I am not talking about per ton per mile. That is one of the differences between us. We have a property here upon which we must have a return. That is what we are looking after. You may be wrong, and I may be right, or I may be wrong, and you may be right, as to how to ascertain that. So you do not aid us any when you say 'per ton per mile.'

A. I cannot compare it in any other way.

Q. The only way I can compare it is by way of the investment.

A. I don't think you could.

Let me ask you, to illustrate, to show you that you couldn't.

A shipment from St. Louis to St. Charles, of a ton of freight, you would not expect the railroad company to make as much profit as on a ton of freight from St. Louis to San Francisco. Therefore, while you might say they made more on the long shipment, they ought to, because it is days in transit, and is going thousands of miles.

You must reduce it to a unit, to permit a comparison which will mean anything.

Q. But every time you are asked a question of whether it costs more, or the revenue is more, you add to it the phrase, 'per ton per mile.'

A. Yes, sir.

Q. That is just a method of ascertaining the thing, isn't it?

A. Yes, sir.

Q. What I want to know is, whether in the light of your experience you would undertake for one moment to say that upon the money invested in the property, more money is made upon the State business, or the short haul business, than there is upon the long haul business?

A. I will answer that by saying that in my judgment, after a very careful study of the situa-

tion, the Missouri Pacific railroad made more actual net revenue out of the one and a half million dollars of State freight business than they did in the year 1904, and the same amount in the year 1905, than they did out of the four million and odd dollars of interstate business.

Q. That is regardless of how you ascertain it?

A. Yes, sir.

Q. Regardless of 'per ton mile?'

A. It is not regardless of how you ascertain it, because I spent an immense amount of labor to reach that determination.

Q. Let me come back to the question, because if it takes a week I am determined to get your best judgment about it.

A. I am willing to give it.

Q. You may be right, or I may be right, but in the end, the question is decided by the investment and the returns upon it. Do you say, taking it altogether, and regardless of how you arrive at the result—that the short haul business is preferable, and more revenue is made out of it, than out of the long haul?

A. Per ton per mile—

Q. No, sir, irrespective of the per ton per mile. That is a theory. Irrespective of that, and just as a general proposition?

A. I can not compare it, unless you have a whole state. Take Missouri: I have compared Missouri, and have told you that in my judgment they have made more actual money out of the one and a half million dollars of State business than they did out of the four million dollars of interstate business. That is my very best judgment.

Q. Regardless of how you estimate it?

Mr. Ladd: He told you how he gets at it.

Mr. Hagerman: I don't know, and I shall not desist until the Master stops me. The witness cannot dodge the question of giving me his best judgment upon the matter.

Upon this property, or any other railroad property in Missouri—

Mr. Ladd: It is hardly fair to Mr. Ludlam to say he is tfying to dodge an answer.

Mr. Hagerman: He puts his theory in every time.

The Master: The difficulty is this: Mr. Ludlam repudiates any other theory, in arriving at the judgment he has reached, than the ton mile. He will not admit the possibility of arriving at it in any other way; therefore, he puts in the only theory he has.

Mr. Hagerman, you may put the question without respect to his theory, and if he can give an answer, without respect to the only theory he has, he may do so.

Mr. Hagerman: I understand Mr. Ludlam, and I am not criticizing him for exercising his judgment. He is entitled to do it, just as much as I am entitled to exercise mine, and you yours in the end. But this is the question I wish to ask him:

Eliminating the ton mile, what do you say about that?

A. I would not express any offhand opinion as to the relative cost or the relative profits of the two classes of business, except as the result of mathematical calculation which I made. I have seen too many opinions expressed in this case that were in my judgment altogether wrong, to care to express just an offhand opinion.

The opinion I have expressed is based absolutely on the figures we have made, and the study we have made, and the work we have done, in this case, and it is all predicated on the per ton per mile cost.

Q. And, unless you can predicate it upon the per ton per mile basis, you have not any opinion to express?

A. I would not care to express an opinion, except it was worked out on the most reliable and scientific basis that would be obtained.

Q. You have not and did not intend to express any opinion whatever, except it is based upon the per ton per mile basis; am I right about that?

A. Yes, sir; you are right."

(Record, Vol. I, pp. 1197-9.)

On his re-direct examination, he said:

"Q. I want to ask you one more question; it has been gone over, I expect, but I would like to ask you:

You have said that your opinion is that the ton mile basis is more accurate than any other, both for the purpose of ascertaining cost and earnings, in an effort such as we are engaged in in this case, to ascertain the difference between revenue, as well as cost, which exists between State and interstate traffic.

Now, I wish you would state, as briefly as you can, why, in your opinion, the ton mile basis or method of arriving at a result is more accurate than any other? And if there are any reasons why the ton mile basis is not as accurate as the revenue basis?

A. In my judgment you have to consider two elements: The first is the weight of the freight, and the second is the distance which it travels. All railroad rates are made upon the distance that the freight is going. What I mean by that is, if you go to an agent to ship freight, he does not merely ask you what it weighs, without regard to where it is going, whether from here to San Francisco, or from here to Kansas City. The rate is necessarily based upon the distance which the freight is going, as much as it is upon the weight. It takes the two elements into consideration; first, the weight of the freight; and, second, the distance it is going.

For the purpose of illustration, you might compare it with the passenger legislation just passed in this State and now under consideration. The rate is so much per passenger per mile. It does not stop with the passenger. It would be absurd to pass a law that the railroad should charge only so much per passenger twenty-five or fifty cents, because the number of passengers is only one element. The distance they are going is another element to be considered.

The ton mile unit takes into consideration both the element of the weight of the freight and the

distance it is going; just as the bill passed by the Legislature takes into consideration the distance the passenger is to travel.

Mr. Hagerman: It just says so much per mile.

A. Yes, sir; exactly what the per ton mile unit does. You cannot conceive of a freight rate being quoted of so much per ton. It is all governed by those two elements.

By Mr. Ladd:

Q. When you are trying to ascertain or approximate as nearly as possible under the circumstances the relative cost of doing State and interstate business, is it, in your opinion, an essential feature to be taken into consideration, the difference between the interstate haul and the State haul?

A. Yes, sir; it is one of the most essential elements, and without taking that into consideration, in my judgment, you cannot arrive at any conclusion that means anything.

Q. Would that be true, speaking generally, Mr. Ludlam, of the operating expenses taken as a whole, in order to get an average?

A. To get an average that would mean anything, you would have to reduce it, in my judgment, to the per ton mile unit.

Q. On all the operating expenses?

A. Yes, sir.

Q. Do you mean to say—I don't suppose you do—that we reach in that way an accurate result?

A. No, sir; I think there are certain elements that enter into the question that makes it impossible to determine the absolute cost of the two classes of freight.

Q. But you do think we reach a result which is more nearly the true situation, in that way, than any other way; is that it?

A. Yes, sir."

(Record, Vol. I, pp. 1208-10.)

At a later date, on cross-examination, he said:

"Q. Well, I will say 'a simple way:' So far

as ascertaining the cost, the gross earnings would be a simple way?

A. No, sir.

Q. It would not be a simple way? In the distribution of the total expense of the doing of the business in Missouri, as between State and interstate, would not the simplest way you can conceive of be on the revenue basis?

A. Yes, sir; the simplest and the most inaccurate.

Q. I will give you the benefit of your judgment as to the inaccuracy; but so far as simplicity is concerned, that is true?

A. It would be very simple.

Q. All on earth you would have to do would be to ascertain what percentage of the revenue was State, and then take that percentage of the total expenses; isn't that true?

A. Yes, sir."

(Record, Vol. II, p. 2091.)

And again:

"Q. No, sir; your statement says 'per ton per mile,' and it may be right; and it may be that you are right; and that is the way to ascertain the cost, or it may be that I am right, or that some other witness is right, and that it should be ascertained in some other way; but are you willing, however it is ascertained, and whatever it costs, whether it costs three, five or seven times as much, or from three to seven times as much, to do the less than car load business, both State and interstate, as it does to do the interstate car load business—would you be willing to go that far?

A. No, sir; I would not be willing; if it was determined that it was proper to assume, for instance, that the ton basis was the correct basis, I would not be willing to say that in my judgment it would cost from three to five times as much to move a box of dry goods ten miles as it would cost to move a car from New York to San Francisco.

Q. What I am trying to get at, is, will you leave it to the judgment of others, the way to as-

certain the cost, assuming it could be accurately ascertained in the first instance what the cost was to handle the interstate car load business, and you are going to accurately ascertain that, you would be willing to say that in you judgment it costs from three to seven times more to handle the less than car load business?

A. If you can reduce it to a unit I can compare it with I would.

Q. And without that you would not?

A. No, sir.

Q. In other words, in regard to this question comes the situation we had the other day—eliminate the question of ton miles, and you would not give any opinion whatever.

A. No, sir; I would not compare a known quantity with an unknown quantity.

Q. Cannot you, in fairness, answer as you did the other day, that unless you can base your opinion upon the ton mile basis, you will not give any opinion at all?

A. Yes, sir.

Q. You are willing to say that?

A. Yes, sir."

(Record, Vol. II, pp. 2098-9.)

And on re-direct:

"Q. You were asked in your cross-examination whether in reducing to a ton mile basis you took into consideration the amount of waste space in the car, and you answered, substantially, that you did not. Was that taken into consideration in the case of every kind of freight, State or interstate?

A. No, sir; it was not.

Q. Both were treated alike.

A. Both were treated exactly alike."

(Record, Vol. II, pp. 2139-40.)

And in the Wabash case:

"Q. I will ask you to state, Mr. Ludlam, what, in your opinion, is the correct unit of cost, and revenue, in the railroad freight business?

A. I think the per ton mile basis is the only correct basis. I might explain that by saying *it is the only one that has been devised or is known to railroad men, that is regarded as reliable.*

Q. I will ask you if that is the one which is *generally adopted by railroad companies,* as far as your knowledge extends?

A. *Yes, sir.*

Q. Do the annual reports of railroad companies, which deal with the details of the management, and review its operations from year to year usually show the ton miles and the cost and revenue per ton mile?

A. The published reports of the different companies usually do. And all companies, whether they publish those figures or not, so far as my knowledge goes, have them in their records.

The Master:

Q. If I understand you, the correct unit of calculation or estimates for accounting in respect of revenue and expenses in conducting railroads, is the ton mile?

Mr. Ladd: Yes, so far as freight is concerned.

Mr. Ladd:

Q. Did you hear Mr. Miller's testimony at the previous hearing in this case?

A. Yes, sir.

Q. You agree with Mr. Miller on that point, do you?

A. Yes, sir.

Q. Is there any other method so correct or convincing, of ascertaining the expenses of the earnings of a company, on different classes of freight, as by using the unit of the ton mile, both for cost and earnings?

A. *In my judgment there is not.*"

(Record, Vol. III, pp. 3039-40.)

Mr. Taliaferro testified as follows:

"Q. What is your opinion as to the ton mile being the proper basis upon which to arrive, as well as it can be arrived at, at the earnings and expenses of the freight business?

A. *I think it is the only basis. I have thought so from the very first day I began this work.*

Q. That is to say, the most accurate results will be obtained as to the relative cost of making the earnings, by ascertaining the average earnings per ton mile, and comparing those with the average cost per ton mile; is that what you mean?

A. As to the earnings, that is strictly correct; as to the expenses, I think, that the cost of doing one thing should be compared with the cost of doing another thing; and not with reference to the earnings in any way. Because, for instance, I have here (indicating paper) a carload of dressed poultry from Kansas City to St. Louis; at the present rates a car weighing 20,000 would earn $66.00. A carload of dry hides in bales would earn $40. I cannot see how the cost of handling those two cars would differ. So that "In proportion to earning" it seems to me is an unknown quantity always.

Q. I mean, taking the whole body of the freight business.

A. Taking the whole body of the freight business, of course the expenses can be worked out. You have the tons, and the tons one mile, and the expenses; and from those figures you get the average expenses per ton per mile.

The Master:

Q. Doesn't the example you give tend rather to prove that the revenue would be a more correct basis than the ton mile basis?

A. I don't think so. Exactly the same weight is handled the same distance, and in one case the revenue is $40.00, and in the other case it is $66.00. If the car costs just the same to handle in both cases, then the cost in proportion to earnings is radically different. And these are not extreme cases.

Mr. Ladd:

Q. If you get the average cost per ton mile of all the freight, and the revenue per ton mile of all the freight, should that be the purpose and intention of any investigation, to ascertain the profits?

A. Absolutely, I think so. It should be the starting point for every comparison.

Q. Why?

A. Because it is a unit which could be used for comparison with the same unit arrived at on any other business. It is the unit and the only one I know of, what is the same in all cases.

Q. What have you to say as to apportioning the expenses of the freight business between State earnings and other earnings in proportion to the revenue derived from the respective classes of business?

A. I don't think that is a proper basis.

Q. Why not?

A. Because the State earnings are made up, generally speaking, of charges based on the full local rates. Whereas, the interstate earnings are made up of just whatever proportions of the through rates may happen to accrue to Missouri on a mileage basis. It absolutely ignores the revenue per ton per mile basis. It ignores the fact, as I believe, that the earnings on State business are greatly in excess per ton per mile of the earnings on interstate business; I am making that only as a general statement, but it has to be so.

Q. The earnings derived, therefore, as I understand you, from a higher schedule of rates; is that what you mean?

A. Yes, sir; and from something like a fixed schedule of rates as compared with interestate earnings which are not fixed in any way. They may vary with every shipment.

The Master:

Q. Do you maintain that a division upon the revenue basis would wholly ignore the fact that they get higher rates from purely State business?

A. Yes, sir; I do."

(Record, Vol. I, pp. 899-901.)

He said on cross-examination:

"Q. So it is a question of method of arriving at it? It is the method you have been using in arriving at the revenue and expenses?

A. It is a method, and the only one I know of.

Q. It is the only one you have investigated?

A. I don't say that.

Q. You said it was the only one you knew of?

A. It is the only way to put everything on the same basis for the purpose of comparison.

Q. In your opinion as an expert?

A. Yes, sir.

Q. If the other, the revenue basis, happened to be the correct way, you have no complaint to make against the method adopted by Mr. Sturgis, you simply don't believe in it?

A. I am simply giving my idea of the correct way, without in any sense criticising anybody else's"

(Record, Vol. I, p. 903.)

And on re-direct examination, he said:

"Mr. Ladd: The exhibits which have been offered on the part of the State here proceed upon the theory that the closest approach to an accurate result, whether as to cost or as to revenue in the State business, is the theory known as the "ton mile theory," the cost per ton mile and the revenue per ton mile?

Now, I will ask you what is your opinion of that theory as distinguished from any other theory that you have heard of. That is, whether by the adoption and application of it results can be more accurately reached than in any other way, and why?

A. *My idea is that it is the most correct basis, and the one that furnishes the best unit for a division of expenses; it is a ton of freight one mile.*

Q. And earnings?

A. And earnings, too.

Q. Why?

A. Because it is a ton of freight one mile. It takes into consideration the length of the haul.

Q. Is that important?

A. The furnishing of the track, the equipment, and the running of the trains, is a large part of the total operating expenses. The distance that the freight had to be handled, it seems to me, is the most important thing to be considered, when you come to think about the cost of it.

A train may consist of two cars or of forty

cars; and so a train mile is not as good a unit.

I think the ton mile is the best basis that is known. My idea is that it is the best.

Q. How is the ton unit?

A. I think the ton unit fails to take into consideration the length of haul and the service. I think the cost is the same where the service is the same, and that the only difference in cost is where there is some difference in service. A ton going one hundred miles uses one hundred miles of track. It uses the equipment for one hundred miles, and has to be cared for for one hundred miles. The whole machinery of the railroad is maintained to see that shipment through to its destination, one hundred miles.

With a ton going fifty miles, the track and equipment and train service and all end fifty miles away.

Q. I will ask you whether you think the results reached in a case like this, upon the application of the ton mile theory, are accurate exact?

A. I think, so far as the unit is concerned, they are exact.

Q. I know that, as far as the unit is concerned, they are exact; but can we accurately determine the exact amount of net earnings on any particular class of business, by the application of any theory of calculation?

A. I do not think so."

(Record, Vol. III, pp. 3259-60.)

And upon cross-examination:

"Q. Are you willing to give any kind of an estimate on this broad proposition. Leave to the Court the question of determining upon what basis you must ascertain it and tell me, whatever the cost is of doing the interstate business, how much more it costs to do the State business?

A. *I do not know of but one way by which to make the figures.*

Q. *What is that?*

A. *On the ton mile basis.*

Q. Then you would not listen to any sugges-

tion, or undertake to give any opinion, based upon anything except the ton mile basis?

A. No, sir. I would like to say this, Mr. Hagerman, if I may.

My first impressions of the ton mile were gotten many years ago, when I sat opposite the Chief Traffic Officer of a railroad company, and saw him figure on that basis.

When I got into these cases, and saw them figuring on the revenue basis, I thought immediately it was wrong, because I know the State business must have been done at a much higher rate per ton per mile than the interstate business. I have had that in mind from the beginning, and the more I have thought about it, and the more I have listened to the testimony, and found that the railroads out here were run just as I supposed they were, the more I have become convinced that the ton mile is the best basis.

Q. I am assuming you would not swear to it, unless you were convinced that it is so.

A. I am only telling you why I think it is so.

Q. That being so, I am simply asking you whether you would be willing to venture an opinion, that whatever that cost is, and however it is ascertained, how much extra would it be to do the State business?

A. Only on one basis.

Q. You would listen to nothing else, or consider nothing else.

A. *Nothing else would mean anything to me.*

Q. You would not express any opinion on any other basis?

A. No, sir.

Q. And every opinion you would express would be limited to the ton mile basis?

A. Yes, sir.

Q. That is a frank way to put it, and there is no misunderstanding about what you mean.

You did state to Mr. Ladd that there was no way by which it could be accurately determined.

A. I meant that exactly.

Q. This extra cost?

A. Yes, sir. None that I know of.

Q. In order to fairly compare, the first of all things you would have to have would be a comparison of the character of the shipments, wouldn't you?

A. I don't know what you mean by that.

Q. The class of freight. Wheat ought to be compared with wheat, and furniture with furniture, ought it not?

A. Nobody knows what it costs to do any particular kind of business, and nobody pretends to know.

Q. But that is the way to make a comparison, if you are going to be accurate?

A. I don't think so. I think when you confine this business to state lines, the best information we we could get is what we already have. I do not mean to say we have it all, but I think we have the best figures; and that is, the relation of state ton miles to total ton miles, and the average haul of the two kinds of business.

Q. And that does not take into consideration at all the capacity of the car, or the amount of waste tonnage?

A. Well, I know the cars are used interchangeably, and we are sure that every facility that is maintained by the Company is maintained for both kinds of business; it is all hauled over the same tracks, and by the same engines.

Q. That is evading answering my question.

A. I don't think so.

Q. You do not allow for any waste tonnage in this comparison.

A. I do not allow that the interstate carload is loaded any more heavily than the state, because I think it is loaded just as heavily.

Q. On the ton mile basis you cannot make any comparison for waste space or waste tonnage?

A. I don't know what you mean by "waste tonnage." If you mean in connection with the carload business?

Q. I mean in connection with all of the business. The state business that is hauled in any month may or may not occupy as much of the tonnage capacity of the interstate; or, I will concede

you, for the purposes of the question, it may be less. But the point I make is, there can be no accurate comparison unless you have taken into consideration the waste tonnage.

A. Railroads are operated more and more today on the ton mile basis, Mr. Hagerman; and that means getting all you possibly can into a train, and doing all the business you can with one car and one engine. And I do not think there is any discrimination in favor of State shippers when it comes to loading cars. The less than carload business is handled in the same cars, and I cannot see how you——

Q. Will you give me the benefit of an answer to my question, whether the waste space is in favor of state or interstate, there could not be any comparison upon a ton mile basis, by which you would take into consideration the waste tonnage, because it is an impossibility to make the comparison?

A. The ton mile basis takes into consideration the tonnage and the haul.

Q. Does it take into consideration the waste tonnage?

A. *It does just as much in one case as it does in the other; that is all I can say about it.*

Q. That is all you can say about it?

A. *Yes, sir; just as much in the case of state as in the case of interstate.*"

(Record, Vol. III, pp. 3265-7.)

And on further cross-examination:

"Q. Your theory about the ton mile basis is bottomed on the fact of the length of the haul, isn't it? In one case the haul is longer than the other?

A. A longer haul produced more ton miles.

Q. And in reality, that is the substance of your judgment about the ton mile being the proper basis, because you get the benefit then of the increased haul, and measure in accordance with the haul?

A. I do not know that I should exactly agree with that, if I understand your question. I think the relation of the haul of state to interstate freight —or, rather, the relation of the haul of state to in-

terstate freight—is what I would make my estimate on.

Q. I understood Mr. Ludlam in his testimony to put it more sweepingly than that, that he considered the extra haul to be the whole thing, and I wanted to know if you agreed with that view?

A. I would not mean to say that a certain haul would cost a certain figure per ton per mile, and that a longer haul would be less, and a shorter haul more, I would not do that. All I say is that when the same track, the same cars, the same engines, and the same facilities of every character are being used to do both kinds of business, my idea is that one could not cost so much more than the other.

Q. The reason you get the difference between the tons and the percentage of tons, as compared with the ton miles, and the percentage of ton miles, is the difference in the haul, isn't it?

A. The longer average haul of interstate traffic produces a larger percentage of interstate ton miles than of tons or revenue."

(Record, Vol. III, pp. 3267-8.)

And again:

"Q. Mr. Taliaferro, I wish you would state what, in your opinion, derived from your experience of all kinds, which you detailed this morning, and your information which you obtained in various ways, including the information you gained from hearing the testimony in these cases, and examining records, and your investigations, what is the proper unit of cost for freight service?

A. I think the ton mile. *It is the best available unit.* It may not be exactly accurate, but it comes nearer representing the weight of the freight, and the distance it is hauled than any other unit.

Q. Likewise, what is the proper unit of earnings in the freight service?

A. The ton mile, I think. It has always been considered an important figure ever since I ever knew anything about railroads, 22 years ago.

Q. Have you or not been corroborated in your

opinion by the testimony of witnesses which you have heard in these cases?

A. I would regard it in that light. I do not know just what the witnesses may have meant.

Q What witnesses?

A. Going back to the hearings before the Master, I think Mr. Gray of the Northern Pacific bases all his calculations on the ton mile. Mr. Rahn, the General Manager of the Illinois Central, made his figures on the ton mile basis. Mr. Clark of the Missouri Pacific, and Mr. Miller of the Wabash——

Q. Who is Mr. Miller, the General Manager of the Wabash?

A. The Vice-President, I think.

Q. The General Manager?

A. Vice-President and General Manager, I believe.

Q. *Do you happen to know whether any railroad companies keep statistics in their office as to the cost per ton mile of handling freight?*

A. *Yes, sir; I think quite a number of them do. The roads in whose offices we have gone in this work do?*

Q. *What offices?*

A. The Wabash, the Missouri Pacific and the *Burlington Railroads.* I speak of those from a little more intimate knowledge than I have of the others.

Q. What, in your judgment, is the basis upon which the expenses of doing state and interstate business ought to be divided between those two classes of business?

A. I know of nothing more correct than the ton mile. We have considered every basis that has been suggested, and our conclusion is that that is the most correct basis.

Q. What is your objection, or what objection can you state, if there is any objection which is a good one, to dividing these expenses on the basis of the revenue derived from both classes of business?

A. *I don't think the revenue has anything to do with the cost, Mr. Ladd.*

Q. Just go on and explain why that is. You say you don't think so?

A. I know from my personal experience in quoting rates, and in seeing rates arranged, and from the testimony given by traffic men in this case, that the railroad traffic officials never for a minute —that may be a little strong—but they do not consider the cost of the service when they fix their rates.

We know all the roads, for instance, charge the same between St. Louis and Kansas City for hauling the same kind of freight. And we know that no two of them could get it here at the same cost. The revenue is no index to the cost. You might look at so many dollars of earnings, and you would not know at all how many dollars it cost to get it. You could not tell a thing by looking at the earnings.

What we do is to take the expenses, and not consider the earnings at all. We take the expenses and try to find the best basis upon which to divide them. We know the train mile does not mean anything for that purpose; and that the car mile does not mean so much. But the ton mile does represent a ton of freight one mile.

Of course, there are different classes of freight, they do not all weigh the same, and they do not all take up the same space. But there are all kinds of freight in both classes, state and interstate.

And so I feel that that comes nearer to being the proper unit upon which to divide the expenses than anything which has been suggested. It is the thing which produces the cost. It is hauling the freight. And every kind of expense is incurred because of the hauling of the freight, even though it has nothing to do with the actual haul.

Even the station and yard service, and all those things, are all incurred by reason of the fact that the company is operated for the purpose of hauling freight and passengers, moving them around from one point to another.

Now, the ton mile takes into consideration both the weight and the distance. I do not say it costs as much to haul a ton mile on a through train, or

in a carload, as it does a less than carload shipment going a shorter distance. I do say it does not average up things in that way, and say it is just as much for each mile of 100 miles as for each mile of ten miles. We do not do it that way at all. It does not work out that way. But we say because there is some interstate freight which, of course, costs much more per ton mile than the state. Take a carload of freight going across the state, say from St. Louis to Kansas City, and the cost per ton mile on that would be much less than a carload of interstate freight going a short distance in the state. But we find the average. We know how many ton miles we made. We know how many tons we handle. And dividing the ton miles by the tons gives the average haul.

Some of the state freight is hauled much further than the interstate, but on the average the state business is hauled a shorter distance than the interstate, and so to that extent we average it. The ton mile averages up things and gives us a basis upon which to compute the cost. Not ton mile for ton mile, but we have a unit upon which we can work when considering the various kinds of expenses. We say that some are the same, some are more, and some are less, as applied to that kind of a unit.

It seems to me, taking all the roads in Missouri, while they do not all run between the same points, of course, and do not all handle just the same kind of business, if the revenue in any way fixed the cost, the railroads should all be operated at nearly the same per cent. of cost to earnings; and we know they do not, and we know some are very low, and some are more than their earnings, according to their own figures.

In other words, *what you get for it does not have anything at all to do with fixing the cost, or does not necessarily have any relation to it. Therefore, we have not used it on our calculations, and those are our reasons.*

Q. Is the ton mile unit an invention of yours?

A. I hardly think that, sir. It came to us very early in this case.

Q. It has been used before, has it?

A. I don't know whether it has been used.

Q. You say the railroads used it in getting up their statistics.

A. They use it for all freight. I cannot say any of them use it in dividing expenses between state and interstate, because I don't know of such a case. I do not know of any other place it has been used.

Our work here has been just as it is when we undertake to do any kind of work for a client; we try to get down to the facts, and right conclusions, as far as possible.

We found we had a situation where these expenses had to be divided between state and interstate business, and we considered the various bases that offered themselves, and we concluded the ton mile basis was the best of all—best because the most accurate.

Q. Can those expenses, Mr. Taliaferro, be accurately divided in any way between state and interstate?

A. Not that I know of.

Q. But you think a division on the basis of the cost per ton mile approaches more nearly to accuracy than any other method you have heard of, is that it?

A. Yes, sir.

Q. So far as your experience with railroads and railroad accounting goes, have the railroads undertaken in their systems of accounting to ascertain the cost per ton mile?

A. *Yes, sir; so far as I know all the roads do it. At least I believe I could say that is generally done without fear of contradiction.*"

(Record, Vol. IV, pp. 4519-22.)

These views of the experts for the State have thus been presented in full, because nothing that counsel can suggest would add to such force as they may possess. They point

out, in the language of men who have made a study of the subject, such fallacies, if any, as may exist in the "revenue theory" of dividing expenses; they also define clearly the reasons, cogent or otherwise, for dividing the expenses by ascertaining, as nearly as practicable, the cost per ton mile of handling each class of freight; in other words, by the application of the "ton mile theory." Upon this expression of their views, the State of Missouri as regards this particular question, submits its case.

Nor is the "ton mile theory," so called, an invention conceived to meet the exigencies of this case. It is a well known and long accepted method of ascertaining cost. It has been adopted by railroad companies generally in their systems of accounting, followed by them in the ordinary course of their business, deemed by them necessary to be kept that they may know whether they are losing or making money. In them the ton mile is the unit, both of cost and of revenue. And variations in the size of either of these units, as shown by these accounts, are to the company's managers at all times subjects of the keenest interest and watchfulness.

The experts for the State are not alone in the opinion that the cost per ton mile is the measure, and that cost cannot be ascertained by a contemplation of revenue. They are supported in their view by the opinions of some of the most conspicuous witnesses for the complainant expressed in unmistakable, and sometimes emphatic, terms.

Mr. Elliott says that the ton mile "is a very good unit to compare with." (Record, Vol. I, p. 476.)

Mr. Willard, the vice-president of the complainant, speaks always of the relative expense "per ton mile." (Record, Vol. I, pp. 512, 517, 519, 524, 527.)

Mr. Rawn, General Manager of the Illinois Central Railroad Company, says: "We do compute our cost upon what is called a ton mile basis." (Record, Vol. I, p. 578.)

Mr. Gray of the Northern Pacific Railroad Company, in all his experiments and computations, seeks to arrive at the cost per ton mile. (Record, Vol. I, pp. 622, 623, 624, 628, 644-5, 652, 663, 680.) And being asked whether he thought it the best and proper basis upon which to reach the ultimate expense, he said: "I think the only basis" (p. 645). He also said that in ascertaining the actual cost of doing the work "*the question of revenue cuts no figure whatever*" (p. 680).

Mr. Stuart, General Manager of the Erie Railroad, says that he "adopts the system of per ton per mile in ascertaining earnings and cost of operating" on his road. (Record, Vol. I, p. 698.)

Mr. Clark, Division Superintendent of the Missouri Pacific Railroad, said that he was a "ton mile man," and all his estimates of expense were upon the basis of the ton mile, and that he accepted it "because it is used so generally" (Record, Vol. II, p. 1646.)

Mr. Fisher, Supervisor of Weighing and Inspection for the Missouri Pacific Railroad Company after testifying that in his opinion it cost from two to six times as much to earn a dollar in State freight business as to earn a dollar in the interstate business (Record, Vol. IV, p. 1753), said that while he knew that railroad companies used the ton mile basis of cost for statistical purposes, it should not be "used *in a performance of this kind*" (p. 1754).

Mr. Tyler, General Superintendent of 2,000 miles of the lines of the St. Louis and San Francisco Railroad Company, said that his company kept an accurate account of the cost per ton mile of moving freight. (Record, Vol. IV, pp. 4104, 4129, 4131-2.)

Mr. Doddridge, former General Manager of the Missouri Pacific Railroad, while condemning it in his opinion as a witness, says that the ton mile as a basis of calculation for ascertaining cost, is used by the Interstate Commerce Commission and by railroad companies "for statistical purposes." (Record, Vol. II, p. 1585.)

Mr. Miller, General Manager of the Wabash Railroad since May, 1905, and who for twenty-five years immediately preceding, had been connected with the railroad of the complainant in Missouri as general superintendent, division superintendent, assistant superintendent, and in other capacities, testified as a witness for his company, and said: "Our unit is ton miles." (Record, Vol. II, p. 2836.) He said that the annual reports of his company for each of two years then shown to him, exhibited the cost per ton mile of transporting freight on the Wabash system; that the preparation of such a statement involved great labor and was for the purpose of showing the ton mile revenue and the ton mile cost; that the ton mile is the unit and that it "is the unit that is generally used" (pp. 2839-40).

He testified:

"Q. In order to reach that result, let me see if I understand how it is attained: You take each shipment, interstate or intrastate, and suppose it is a ton, you multiply that ton by the number of miles you carry that shipment; and you deal with all the shipments that way, and the aggregate of those ton miles produces your total ton miles. Is that right?

A. I think that is the way they get at it.

Q. Was not my question quite clear?

A. Oh, yes.

Q. That is the way it is done?

A. Yes, sir.

Q. Then you divide your total revenue from freight by the total number of ton miles, and you get your revenue per ton mile, don't you?

A. Yes, sir.

Q. And you divide your total freight expenses by your total ton miles, and you get the cost per ton mile, don't you?

A. Yes, sir.

Q. *And you regard the ton mile as the unit, and the cost per ton mile and the revenue per ton mile, as indicating more exactly than by any other method that can be pursued, the condition, prosperous or otherwise, of the freight business of the system; isn't that right?*

A. *Yes, sir.*

Q. *And is that a custom which prevails among the railroads generally?*

A. *Yes, sir.*

Q. *Then the cost per ton mile is the unit of expenses in the freight business?*

A. *Yes, sir.*

(p. 2840.)

All his estimates of relative expense were of expense per ton mile (pp. 2851, 2860, 2872, 2900).

"We do not use the train mile unit in our comparisons, because it does not represent the modern unit, either in comparing or in our statistics."

(p. 2903.)

"Q. What is a ton mile?

A. It is the movement of a ton of freight one mile.

Q. And how do you get at the cost per ton mile?

A. By computing the mileage over which the tonnage is handled and finally dividing the total tonnage carried one mile into the total expenses. The cost of conducting transportation, and those things that appear in that sheet, under the head of 'Operating expenses,' were reached by dividing the tonnage of the trains into the cost, and there is the result.

Q. As I understand you, at one time the method employed was the cost per ton per train mile. Is that true?

A. Yes, sir.

Q. Did I understand you to say that that method has now been abandoned?

A. Most of the roads have up-to-date operating statistics, such as those are (indicating), but pay no attention whatever to the train mile. That was the unit formerly used on the Wabash, and we abandoned it because it did not reflect the actual operations of the railroad and the cost. And it did not show by accounting divisions each train run: an accounting division is practically a train run; an accounting division is practically a train ing each train by itself, even on the branches. The plan is to find out where the leaks are, locate them, and plug them.

Q. Is it generally conceded by railroad people that the train mile cost does not correctly indicate the cost of handling freight business?

A. Yes, sir.

Q. And that method has been abandoned by railroad people?

A. As a unit.

Q. As a unit?

A. Not entirely. We include it because that form of statistics shows it, but do not use it in any way."

(pp. 2904-5.)

Mr. Minnis:

"Q. Mr. Miller, if I understand you, in arriving at the cost of freight per train mile you add together the entire number of miles that are covered by freight trains during a given period and you divide that aggregate into the aggregate cost for the same period, and that gives you the cost per mile. Is that correct?

A. That is the way the train mile is reached.

Q. In order to get the average tonnage of trains, you take the total tonnage of all trains and divide that by the number of trains that carried that tonnage, don't you?

A. Yes, sir.

Q. According to this method the train mile cost will be less where the average train tonnage is less, than it would be where the average train tonnage was greater, wouldn't it?

A. Yes, sir.

Q. That is necessarily so because it does cost some more to carry a heavy load than a light load, does it?

A. Yes, sir.

The Master:

Q. That system then would be in the direction of putting a premium on light trains?

A. Yes, sir; that is the reason it was discontinued as a unit of determining the cost of transporting and handling freight. The best showing could be made by running the trains light, on a train mile basis. But that is not true on the ton mile basis. *You get down to "brass tacks" on ton mile.*

Q. *You get down to the actual conditions on the ton mile?*

A. Yes, sir."

(p. 2906.)

Shortly after the decree was rendered in the court below, the late Mr. E. H. Harriman, expressed his views upon various subjects in an interview which was published simultaneously in all the leading papers in the country. Among other things he said:

> "How would you effect a reduction in the expenses of the government?" was asked.
>
> "By applying the *cost per ton per mile rule*, so to speak, by which *the railroads effect their economies*. I mean by that, that the railroad managements know what it *costs them to transport a ton of freight one mile* and are governed accordingly, and, furthermore, *they are constantly striving to reduce that unit of cost*. If this principle were to be applied to the financial problems of the government, you would see a marvelous change within a few years. In the management of the government there should be more thought of what is right and less thought and less care about political success."

The Chicago Record-Herald, of April 1, 1909.

But the railroad companies have, in this litigation, abandoned their own "unit of cost;" they have deserted their own established systems of accounting; they present a new "unit of cost," unknown to those systems. In their place, they offer another method, another unit, which, in the practical management of their business, they ignore. It is upon the

devices of the arithmetician and his skill in the juxtaposition of figures, and upon mere *opinions* instead of *facts*, they choose to make their case depend.

It is said that the result in Ames vs. Union Pacific Railway Co., 64 Fed. 165, and again, upon appeal, in Smyth vs. Ames, 169 U. S. 466, was reached by Mr. Justice Brewer and by this court, through the application of the revenue theory; that in that litigation, the expenses of the intrastate freight traffic were ascertained upon the basis of the revenue from that traffic.

We do not admit that the result was reached by the application of the revenue theory, as exploited in this case. It does not appear in the case referred to. But even if what is in the case at bar, termed the revenue theory, had been consciously and explicitly adopted by the court for the purposes of that case, it would afford no sufficient reason for its application in the present controversy.

Even if it were a fact that in that case total operating expenses were divided between State and interstate freight business in proportion to the revenue derived from each class of business, proven facts render it entirely inadmissible of application to the case at bar. As has been seen, the revenue per ton per mile derived by the complainant from its State freight business is more than twice as large as that realized by it from its interstate business; while, as can be made to appear from the tabulated statements in Smyth vs. Ames, the revenue per ton per mile derived by the companies interested in that controversy, for the transportation of State and interstate freight, was substantially the same.

Again, the method by which this court in that case reached its conclusion was not criticised, nor was any other method suggested by counsel. No issue in that respect was presented to the court for its determination. It had no opportunity to choose one of two methods, because only one method was offered to it for consideration. The propriety of that method was not even discussed; much less were the fallacies of what is here called the revenue theory exposed.

But now in this case a method, and, as we think, the best of all methods, being proposed for the solution of the question, and its justice, fairness, reasonableness and the results of its application being for the first time shown to the court, with light and information never before offered to any court, the complainant asks this court to adopt the revenue theory, and announce the same as a rule of law and a principle of national jurisprudence by which the courts of the Nation, in all future litigation of this character, are to be governed.

If this rule be approved it is the end of any legislative regulation of intrastate rates in the State of Missouri. Not only may the companies continue to charge the rates which prevailed before the enactment of the legislation here complained of, but they may with impunity, raise the rates for intrastate freight far beyond those under which they have been operating for many years. Because these heavy losses, said to be shown by the application of the revenue theory, were sustained under the rates as they were. If that be true, the companies have a right to very largely increase those rates and no power can prevent them from doing so.

It may be properly mentioned at this point that the Circuit Court of the United States in the District of Nevada, has quite recently, in Southern Pacific Co. vs. Bartine, 170 Fed. 725, definitely rejected the view that expenses can be ascertained by a comparison of earnings.

L.

THE OPINION OF THE EXPERTS FOR THE STATE UPON THE QUESTION OF COST.

It has been stated that the experts for the State wholly reject the revenue theory and its application as a means of ascertaining the cost of doing the State freight business, and their views upon the question have already been reproduced. In their judgment the only proper method, or the best prac-

ticable method, is to ascertain, as nearly as possible, the average cost per ton mile of handling each class of freight, and then the difference between this average and the average revenue per ton mile of each class, will represent the average net profit or net loss, as the case may be, on each ton mile of freight handled.

It does, in the opinion of the State's experts, cost more per ton mile to handle State than interstate freight.

In Mr. Ludlam's opinion the increase of expense per ton mile is not more than 25 per cent. (Record, Vol. I, pp. 924, 932, Vol. II, p. 2006, Vol. III, pp. 3045-6). And after making liberal allowances it could not be as much as 50 per cent. more. He says:

> "Q. Mr. Ludlam, in your opinion, is it possible or practicable to ascertain accurately or exactly the increased cost of doing State business over interstate business?
>
> A. No, sir.
>
> Q. What approach to accuracy do you think can be made?
>
> A. I think there are certain elements that enter into the question that are more or less a matter of opinion. Such, for instance, as the increased cost of doing business on local or way trains, over the cost of doing business on through trains. But I think if you make allowance for all those questions, all of those elements, you can still demonstrate even after making the most liberal allowance for those items that are matters of opinion, and still demonstrate that mathematically the cost of doing the State business could not exceed the cost of doing the interstate business by as much as 50 per cent.
>
> Q. Per ton mile, do you mean?
>
> A. Yes, sir.
>
> Q. And you think that within the 50 per cent limit it might be a matter, and is to some extent at least a matter of opinion?
>
> A. Yes, sir. I think I said that as to certain items it is a matter of opinion. But if you allow the most exaggerated estimate of those particular elements that are matters of opinion, you still cannot exceed a total maximum cost in excess of 50

per cent on the State business over what it is on the interstate business per ton per mile.

Q. Within that 50 per cent limit I would like to ask you to give such opinion as you may have derived from your investigation during these cases, and from any other sources of information you have enjoyed, if you have not been—

Mr. Hagerman: That is objected to, because this witness under the testimony is not qualified to express an opinion on that subject.

Mr. Ladd: Let me finish my question.

Questions continued.

Q. Your opinion as to the extra cost of doing the State business over interstate business?

Mr. Hagerman: That is objected to, because the witness has not shown himself to be qualified to express an opinion upon that subject.

The Master: The objection is overruled.

A. In my opinion the cost of doing the State business is not in excess of 25 per cent more than the cost of doing the interstate business.

Q. Per ton per mile?

A. Per ton per mile."

(Record, Vol. II, pp. 2005-6.)

Mr. Taliaferro was of the opinion that the increased expense of handling State over interstate freight was less than 50 per cent. per ton mile. (Record, Vol. I, pp. 987, 1056.)

In the Missouri Pacific case he testified before the Master, on March 7, 1907, that in his opinion the additional expense could not possibly exceed 50 per cent per ton mile, and that 35.57 per cent., as shown in an exhibit at that time produced, pertaining particularly to the operations of the Missouri Pacific Railroad Company, was a result as nearly accurate as he could reach. His testimony was as follows:

"Q. You say the results which are reached by the application of the ton mile theory, and different results are reached in different exhibits

here, offered by the State, based in different hypotheses; you think none of these results are (as?) to net earnings are accurate. But I will ask you what, in your opinion, based upon your knowledge of the subject gained in the way I have stated, and in other ways—what kind of an estimate you would make as to the extra cost of doing all State business over all interstate business in this State, per ton mile? As applied, of course, particularly to the Missouri Pacific railroad?

Mr. Hagerman: I object to it on the ground that this witness is not qualified to express an opinion on the subject.

The objection is overruled.

A. My idea is that that additional expense cannot possibly exceed fifty per cent of the cost per ton per mile of interstate business. That is the limit. I think it is less.

The Master:

Q. That is to say, it would not be more than one and one-half times as much per ton mile?

A. Yes, sir.

Mr. Ladd:

Q. That is to say, if one dollar was the unit of cost of interstate business per ton mile, it would not be over one dollar and a half for State business for the same thing?

A. That is it.

Q. What would you say as to the meaning of any calculation based upon the revenue without reference to the service rendered, calculations as to cost, I mean?

A. They would not mean anything to me.

Q. I ask you what degree of accuracy do you believe can be reached by the application of the ton mile theory to cases of this kind, and what has been reached. You say in you opinion you do not think it would cost over half as much more per ton mile to do the State business than to do the interstate business. Withing those limits of fifty per cent per ton mile do you believe that a reliable result can be reached by the application of the ton mile theory?

A. My theory is that applied to the Missouri

Pacific situation, where our investigation showed that the State business was hauled just about half as far as the interstate, that our exhibit 35, which doubled the cost of station, yard, train and engine service, comes as close to showing the actual figures as any that could be made, to cover this situation. Although I think that in doubt(1?)ing the train and engine service we have more than provided for the maintenance of terminals, which might be heavier on a State shipment than on an interstate shipment. That 35.57 per cent, as shown by exhibit 35, appeals to me as being the best figure that could be made, as accurately."

(Record, Vol. III, pp. 3260-1.)

And later, December 22, 1908, after still further investigation of the facts, and study of the subject, testifying in open court, he said as to the additional expense per ton mile, in his opinion 50 per cent. would be the highest and 20 per cent. the lowest. (Record, Vol. IV, pp. 4522-3, 4525.)

And that to his mind, 29.07 *per cent. was the nearest figure to a correct one* (p. 4554).

The operating expenses of a railroad are composed of details which are arranged under four general heads or divisions:

Conducting Transporation.

Maintenance of Equipment.

Maintenance and Equipment.

General Expenses.

(Record, Vol. I, pp. 237-8, Vol. II, 1257-61.)

And sometimes there appears another division of less importance under the head of "Traffic Expenses."

The expenses of "Conducting Transportation" are the largest in amount of all. They are, speaking broadly, rather more than half of the total operating expenses. (Ludlam's

testimony, Record, Vol. III, p. 3046; Doddridge's testimony, Record, Vol. IV, p. 3855.)

In them are included, among other things the expense of the movement of trains over the road, and the "terminal expense," sometimes referred to as "station and yard expenses," being those incident to receiving freight at its point of shipment, and delivering it at its point of destination. (Mr. Tobin's testimony, Record, Vol. III, pp. 2605-6; Doddridge's testimony, Record, Vol. IV, p. 3855.)

The experts for the State, while being of the opinion that the cost per ton mile for handling State freight is larger than that of interstate freight, find that all, or substantially all of the increased expense is incurred in "conducting transportation." Mr. Ludlam was of this opinion. He said:

> "Q. In what department or division of the expenditures is such additional expense as there may be in the case of intrastate freight over interstate freight found?
>
> A. I should limit it almost entirely to the "Conducting transportation" part of the operating expenses. There might be a very small fractional part of the maintenance of way and structures expenses, that would apply to the State freight in excess of the interstate, on account of the fact that the State freight uses the tracks of the terminals more per ton per mile, on account of the haul not being so long between terminals as in the case of interstate freight.
>
> Q. Well, could you estimate—I do not suppose you could tell it exactly—what proportion of the entire increased expense of handling intrastate freight is incident to that division of the expense contained under the heading "conducting transportation?"
>
> A. Nearly all of it. It is hard to express it in percentage, for the reason that while I think there might be a little increase applicable to the State freight, in the case of "Maintenance of way and structures," I think there would be a decided

decrease in the case of "general expenses." I think there would be quite a little increase in the case of conducting transportation."

(Record, Vol. III, pp. 3043-4.)

And Mr. Doddridge said that the difference in expense in that department was more marked than in any other. (Record, Vol. IV,, p. 3856.)

Mr. Taliaferro, another of the State's experts, was of the opinion that the extra expense was "confined entirely to the conducting transportation."

(Record, Vol. I, pp. 966-7.)

Mr. Ludlam and Mr. Taliaferro will not allow that any extra cost is to be charged to the State business on account of "Maintenance of Way and Structures."

(Ludlam's testimony, Record, Vol. I, pp. 932, 1153-5.)

Mr. Ludham says:

"In my opinion maintenance of way and structures would be the same per ton per mile in the case of State freight as in the case of interstate" (p. 1153).

And further:

"Q. You do not charge to the State traffic any more in proportion, on account of track maintenance, than you do the interstate traffic?

A. No, sir.

Q. Do you know of any reason why it should be charged any more?

A. No, sir; I cannot conceive that a ton of freight moving over the tracks would wear the track any more because that ton happened to originate in Missouri than it would if it originated in Ohio, Canada, Texas or some other point."

(Record, Vol. I, p. 1154.)

Mr. Taliaferro said:

"I do not think any distinction can be made so far as the maintenance expense, the maintenance of

way and structures and the maintenance of equipment are concerned, as between State and interstate business."

(Record, Vol. I, p. 965.)

And again:

"I would not add anything to the State cost on account of the maintenance of way and structures. I think the use of the track must depend upon the number of cars that are required to handle the business, generally speaking. The maintenance of the stations is a very small item in the total way and structures expense."

(Record, Vol. IV, p. 4525-30.)

It is true that Mr. Doddridge would assign to the State freight the same proportion of increased cost of "maintenance of way and structures" which he thought was incurred in "conducting transportation." He could not give any reason for it, but suggested, with pleasing *insouciance*, that the proportion of increased expense having, as he thought, been found in one branch of the operating expenses, it might as well be applied all the way through.

(Record, Vol. IV, p. 3923.)

It is indeed difficult to understand why a ton of State freight, moved over complainant's railroad, perhaps in the same train—perhaps in the same car—certainly contained in cars of the same general description, and hauled by engines of the same general character, over the same track, should cause any more injury to the way and structures of a railroad than a ton of interstate freight of the same kind. It is not easy to listen with conviction to the opinion of any man, whoever he may be, or whatever his position, that the one ton should be charged with any larger sum than the other, much less three to seven times as much as the other on account of the expense of maintenance of way and structures.

Upon this particular question the opinion of the State's

experts is supported by the evidence of several of the witnesses for the complainant.

Mr. Miller, General Manager of the Wabash Railroad Company, says there is no more wear and tear of the rails on the main track by a local train than by a through train.

(Record, Vol. III, p. 2876.)

Mr. Gray of the St. Louis and San Francisco Railroad Company regards the extra charge to State freight on account of maintenance of way and structures as "little more than nothing." One reason for this is because a large part of the expense of maintenance of way and structures is due to injuries resulting from natural causes, entirely independent of the movement of trains.

(Record, Vol. IV, pp. 3972-85.)

Mr. Elliott testifies, in substance, that this expense should be charged to local and through freight in proportion to their volume.

(Record, Vol. I, pp. 467-8.)

Mr. Gray of the Northern Pacific, says that it is impossible to distribute this expense between through and way trains.

(Record, Vol. I, pp. 620-1, 634.)

And Mr. Ellis says that that the expense of maintenance of way is caused chiefly by the operation over the road of *passenger trains.*

(Record, Vol. IV, pp. 4264.)

Neither do the State's experts allow that any increased expense is chargeable to the State business on account of "maintenance of equipment."

(Mr. Ludlam's testimony, Record, Vol. I, p. 1156; Mr. Taliaferro's testimony, Record, Vol. IV, p. 4531.)

And as to "General Expenses," which include mainly the salaries of general officers and general agents and the

maintenance of their offics, State business should not be charged any more in proportion to volume, and probably not as much as interstate business.

To be sure, Mr. Doddridge says "you cannot divide it except on an arbitrary basis."

(Record, Vol. IV, p. 3853.)

And, therefore, he says that these expenses must be apportioned "upon some arbitrary basis" (p. 3854).

But Mr. Ludlam is of the opinion that if any difference is to be made in the matter of "General Expenses," the interstate traffic should bear more than its normal proportion, because the State business more easily takes care of itself, being non-competitive, and the time of the general officers and traffic managers is more fully occupied in attention to the competitive business, which is interstate.

(Record, Vol. I, pp. 1159-60, 932.)

Mr. Taliaferro was of the same opinion.

(Record, Vol. I, p. 966; Vol. IV, p. 4533.)

Mr. Gray of the Northern Pacific Railroad Company entirely omits all consideration of "general expenses," because, as he says, they "bear no relation whatever to any particular class of traffic."

(Record, Vol. I, p. 622.)

It has already been stated that the experts for the State concede that, speaking broadly, the cost per ton mile of handling State freight is greater than that of handling interstate freight. The estimates made by the experts of the extent of that increased cost have also been stated.

They refuse to charge to the State freight any more than its normal part in proportion to volume, of the expenses of "maintenance of way and structures," "maintenance of equipment" and "general expenses."

The whole, or practically the whole, of the increased

cost which they concede should be charged to State traffic per ton mile is embraced in that part of the total operating expenses which is included under the general head of "expense of conducting transportation."

It is necessary, therefore, at this point, for the information of the court, to state in what respects the experts for the State do concede that there is an increased expense.

Mr. Taliaferro's opinion upon this point, expressed in his examination in open court, was that the expense of "station service" and "yard service" were, in the case of State freight, twice as much per ton mile as in the case of interstate freight. "Station service" and "yard service" combined, constitute what is called "terminal expense," and both of them are included in the expense of "conducting transportation."

He charges State freight with twice as much "terminal expense" per ton mile as interstate, because the State freight haul is about half as long as the interstate haul, and there are consequently fewer ton miles over which to spread the station expense. The longer the haul, the less per mile of haul is any given terminal expense. It is for this reason that he charges State freight per ton mile with twice as much terminal expense as interstate, and not because State freight always incurs the expense of two terminals, and interstate never incurs the expense of more than one.

He does not accede to this last suggestion, and gives his reasons for rejecting it.

Of the "train and engine expense," he charges to State freight 50 per cent. more per ton mile than to interstate freight. "Train and engine expense" is embraced in expense of "Conducting Transportation," and includes every expense connected with the actual movement of the train which contains the freight. He really thinks that this service does not actually cost State freight as much as 50 per cent. more,

gives the reason for his opinion, and adduces figures based on actual facts in support of that opinion.

(Record, Vol. IV, pp. 4533-36.)

And to this testimony the attention of the court is respectfully invited.

Mr. Ludlam was of the opinion that while "station service" would cost the State traffic twice as much per ton mile as the interstate, the "yard service"—("yard service" and "station service" together, it is to be remembered, constituting the "terminal" charge), would *not* cost the State freight in that proportion, and gives the reasons for his opinion.

(Record, Vol. II, pp. 1998-9.)

Mr. Ludlam also thinks there should be some extra cost allowed on account of train and engine service.

Record, Vol. I, pp. 1156-7.)

The amount of expense attaching respectively to the details appearing under the several general heads, are shown in Exhibit 66 (Record, Vol. V, p. 4996), the figures for which were taken from the books of the St. Louis & San Francisco Railroad Company. (Record, Vol. IV, p. 4552.)

These different items of expense of "Conducting Transportation" also appear in Exhibit 6, taken from the complainant's books of account. (Record, Vol. II, pp. 1258-61.) Among these items appear "Station Service," "Yard Service" and "Train and Engine Expense."

If it be assumed that State freight per ton mile costs 25 per cent. less than interstate for traffic and general expenses, twice as much for station, yard, train and engine expenses, and that in respect of all other expenses there is no difference in the cost, it is the equivalent of assuming that of all the operating expenses State freight costs, per ton mile, 43.22 per cent. more than interstate. (Record, Vol. IV, pp. 4553-4.)

If it be assumed that State freight per ton mile costs 25 per cent. less for traffic and general expenses, twice as much for station and yard expenses, 25 per cent. more for train and engine expenses, and that in respect of all other expenses there is no difference in the cost, it is the equivalent of assuming that of all the operating expenses State freight costs, per ton mile, 22.5 per cent. more than interstate (p. [illegible]).

If it be assumed that State freight per ton mile costs 25 per cent. less for traffic and general expenses, twice as much for station and yard expenses, 50 per cent. more for train and engine expenses, and that in respect of all other expenses there is no difference in the cost, it is equivalent of assuming that of all the operating expenses, State freight costs, per ton mile, 29.07 per cent. more than interstate (p. [illegible]).

And Mr. Dalaferro thinks this latter figure the more nearly correct (p. [illegible]).

After the joint investigation of the freight business of the complainant in Missouri, for the month of September, 1906, was concluded, a tabulated statement, showing its results, was offered in evidence before the Master. This was March 26, 1907. (Record, Vol. I, p. 1026, Exhibit 36; Vol. II, pp. [illegible]).

At that time the experts for the State presented several tables of estimates based upon the Exhibit 36, and the complainant's statement of its operations for the year 1905, as shown in its Exhibit 11 (Record, Vol. I, p. 237), which had been offered in evidence by the complainant in September, 1906.

These tables, so prepared by the State's experts, were Exhibit 37 (Record, Vol. II, p. 1422), Exhibit 38 (Record,

Vol. II, p. 1427), Exhibit 39 (Record, Vol. II, p. 1430), and Exhibit 40 (Record, Vol. II, p. 1435). Any extended comment upon them here would not be useful, for they were fully explained by Mr. Taliaferro in his testimony. (Record, Vol. I, pp. 1027-44.)

The tables were based upon various assumptions of increased cost incident to the handling of State freight. These assumptions did not express the opinions of the experts as to the extent of increased cost, but were offered as showing what results would be attained upon the basis of the assumptions. It is not disputed that the calculations contained in them are mathematically correct, or substantially so.

The result in each combination of assumptions showed a large net revenue to the complainant from its State freight business during the year 1905. It was, for the purposes of all these experimental showings, assumed that the average revenue per ton per mile, both from State and interstate freight business during the year 1905, was the same as during the month of September, 1906, which had been definitely ascertained by the investigation whose results appear in Exhibit 36. It was necessary to assume this, because for no other period than September, 1906, had the average revenue per ton per mile been ascertained.

It was also necessary to ascertain, for the purposes of these tabulations, the number of ton miles of each class of freight. No information upon this point was afforded by the complainant's Exhibit 1, nor had the complainant's testimony at any point stated the number of ton miles of freight of either class. Therefore, in order to ascertain the number of ton miles, the experts divided the total State freight revenue, as shown by complainant's Exhibit 1, by the average revenue per ton mile for State freight, as shown in Exhibit 36, and in this manner obtained the total number of State ton miles which produced the State freight revenue for the year 1905.

And the same method was followed in obtaining the number of ton miles of interstate freight. This was done from necessity, because there was no other course to pursue. (Record, Vol. I, pp. 1035-8.)

Later on, at Kansas City, December 29, 1908, the day before the evidence was closed, Mr. Sturgis, the General Auditor of the complainant, presented some other statements, purporting to show the result of the operations of his company in Missouri for the year ending June 30, 1908. (Record, Vol. V, pp. 4744-6; Exhibit 98, Vol. V, p. 5090; Exhibit 100, Vol. V, p. 5096.) His testimony then given and these exhibits in connection with it, are referred to elsewhere in this brief. It is enough just now to note that by them it was made to appear that if the cost of handling State freight was *50 per cent. more in proportion to revenue* than that of interstate freight, the company, during that year, would have sustained a loss on its State freight business, of $331,117.09, if it had obeyed the maximum freight rate act of 1907. But, as it did not obey it, its actual loss was $117,388.07 less; that is to say, $213,729.02.

If the extra cost were twice as much in proportion to revenue, the net loss of the company on that business would have been $866,707.60, and actually was that sum less the $117,388.07.

If the extra cost had been three times as much, the net loss on account of that business would have been $1,488,503.89, and in fact was that sum less the $117,388.07.

And it will be remembered that Mr. Sturgis had, long before, placed himself upon record that in his judgment the *minimum* cost of doing the State freight business was *three times as much*, in proportion to revenue, as that of the interstate business.

But even taking the extraordinary figures contained in this new statement produced by Mr. Sturgis, as a basis, Mr.

Taliaferro, one of the State's experts, showed (Record, Vol. V, pp. 4763-7; Exhibit 103, Vol. V, pp. 5101-3), that if the expenses of the State freight business per ton mile were 30 per cent. more than those of interstate, the company would, during the year ending June 30, 1908, if it had obeyed the freight rate law of 1907, have derived a net revenue from its State freight business of $595,309.21; and that if the expenses had been 50 per cent. more per ton mile, the company would have derived a net revenue of $479,325.23; the most unfavorable of these assumptions thus affording to the complainant an abundant return upon the value of that part of its property employed in producing the revenue.

M.

THE COMPLAINANT'S STATEMENT OF ITS OPERATIONS IN MISSOURI FOR THE YEAR ENDING JUNE 30, 1908.

On December 29, 1908, just at the close of the hearing at the end of a litigation which had been pending for three and a half years, the complainant, through Mr. Sturgis, its General Auditor, who had been the first and a frequent witness in the case, introduced a concise statement of its operations in Missouri for the year ending June 30, 1908.

(Record, Vol. V, p. 4745; Exhibits 98 and 100, Vol. V, pp. 5090, 5096.)

It was of a nature to command instant attention. Its striking feature was the large proportion of expense to earnings. It is not extravagant to describe this feature as sensational. In the nearly 5,000 pages of printed testimony, nothing approaching such a showing had ever appeared in

respect of the complainant or of any company of like or similar standing.

According to it, the *operating expenses* of the company in Missouri for the year were *83 2-3 per cent.* of its gross earnings.

This statement showing percentage of operating expenses to be so very high in that year taxes credulity, and inevitably provokes a comparison with other figures—a comparison which seriously affects the credibility of this testimony.

The operating expenses of complainant's system for the same year were *only 74 per cent.* (Record, Vol. V, p. 4762.)

In 1904, the operating expenses of the company in Missouri had been *60 per cent.* (p. 4748).

In 1905 they had been *66 per cent.* (p. 4748).

The increase in the proportion of operating expenses over previous years was not caused by a decrease in the earnings. The earnings for 1908 were only 2 per cent. less than in the year 1905. (Record, Vol. V, p. 4762.)

According to the testimony of the same witness, given two years previously, the operating expenses of complainant's system for the year ending June 30, 1901, had been 65 per cent.

For the three months ending October 9, 1901, they had been 59 per cent.

For the nine months ending June 30, 1902, they had been 64 per cent.

For the year ending June 30, 1903, they had been 61 per cent.

(Record, Vol. I, p. 348.)

For maintenance of way and structures, the company spent, in Missouri, in 1908, 80 per cent. more than in 1905, (Record, Vol. V, pp. 4750-1.)

Its expense on that account in Missouri for that year (1908) was $2,800 per mile.

Its expense on that account for that year on the system was *only $1,600* per mile.

For maintenance of equipment in Missouri, it paid $1,800 per mile in 1908.

For maintenance of equipment on the system for the same year, it paid *only $1,400* per mile.

The earnings per mile in Missouri in 1908 were *$11,200.*

The earnings per mile upon the system in 1908, were *only $8,700.* (Record. Vol. V, p. 4758.)

During this same year, 1908, while the operating expenses of the complainant in one of the richest portions of its territory—a territory having within its borders three large cities, St. Louis, Kansas City and St. Joseph, all of them reached by its railroad—were mounting to a level without precedent, the complainant, out of the net earnings of its system, paid a dividend of 8 per cent. upon its entire capital stock of $110,000,000, interest on all its mortgages amounting to $170,000,000 (Record, Vol. I, p. 297), spent $3,225,933.57 for betterments, placed $676,000 in the sinking fund, and had left remaining a small surplus.

During that year the net earnings of the company were over $20,000,000. (Record, Vol. V, p. 4757.)

The surprise occasioned by figures exhibiting such large expense in proportion to earnings, is not lessened by a comparison with the showing made by other companies.

On the Wabash system, for the months of July, August and September, 1906, the operating expenses were 65.5 per cent. of the earnings. (Record, Vol. III, pp. 2794-5.)

On the St. Louis and San Francisco Railroad, in Missouri, for the months of July, August and September, 1907,

the operating expenses were 72.1 per cent. of the earnings. (Record, Vol. V, p. 4790.)

On the St. Louis and San Francisco system, for the year ending June 30, 1908, the operating expenses were 70.08 per cent. (Record, Vol. V, p. 4852.)

On the Missouri, Kansas and Texas Railway, for the six months ending with January, 1908, the expenses in Missouri were 74 per cent. (Record, Vol. V, p. 5065.)

On the Atchison, Topeka and Santa Fe Railroad, in Missouri, for the last six months of 1907, the expenses were 72.3 per cent. (Record, Vol. V, pp. 4939-40.)

On the Missouri Pacific Railway, in Missouri, for the year 1904, the freight operating expenses were 76.19 per cent. of the freight earnings, and in the year 1905, 74.73 per cent. (Record, Vol. II, p. 1656.)

On the Kansas City Southern Railroad for the six months ending June 30, 1908, the operating expenses in Missouri were 70.5 per cent. (Record, Vol. V, p. 5043.)

For the year ending June 30, 1904, the operating expenses of all the railroads in the United States were 67.69 per cent. of the gross earnings, and in Group 6, to which complainant belongs, 65.90 per cent. (Record, Vol. I, p. 880.)

Mr. Howard Elliott, who was for a long time an officer of the complainant, said operating expenses of roads east of the Missouri river were 60 to 65 per cent. of earnings. (Record, Vol. I, p. 482.)

The Interstate Commerce Commission reports the ratio of operating expenses to gross earnings of all the railroads in the United States as follows:

For the year ending June 30, 1903, 66.16 per cent. (18th Annual Report, p. 110).

For the year ending June 30, 1904, 67.79 per cent. (19th Annual Report, p. 84).

For the year ending June 30, 1905, 66.78 per cent. (20th Annual Report, p. 66).

For the year ending June 30, 1906, 66.08 per cent. (21st Annual Report, p. 154).

For the year ending June 30th, 1907, 67.53 per cent. (22nd Annual Report, p. 91).

For the year ending June 30, 1908, 69.75 per cent. (23rd Annual Report, p. 64).

For the year ending July 1, 1909, 66.16 per cent. (Preliminary Annual Report, dated July 1, 1910).

And it is in this same fruitful part of its domain to which these figures charge such extraordinary expense for 1908, as compared with the complainant's system, and as compared with other railroad companies in the State and in the country at large, that the complainant, in 1904, reaped a harvest in net earnings of $5,013 per mile, as against $2,347 per mile for its system, and in 1905, $4,000 per mile, while the system, as a whole, returned to it in profits only $2,534 per mile. (Record, Vol. I, pp. 266-8.)

The strange figures contained in this statement, entering into the case in the last moments of the investigation, naturally provoked inquiry as to details, but the answer was that the witness had not made "an analysis of expenses;" that the statement was "taken from the books. It is the figure that represents the correct figure." And the "books" were in Chicago, 500 miles away.

It is submitted that it was the duty of the complainant, upon whom the burden of proof rests at all times, in presenting this amazing statement at a time when, under the circumstances, the door for further investigation by the State was practically closed, to supplement it by the fullest explanation to account for its abnormal character. In the absence of such explanation, it need not be matter for surprise if it be charitably regarded as probably the result of some mistake.

But it was this statement with its swollen proportion of operating expenses which the circuit court substantially accepted as the basis of its findings and decree (Record, Vol. V, p. 5324); accepted it as an average showing of the operations of the company, in preference to the exhibition of its operations for the years 1904 and 1905, which it had introduced before the Master earlier in the litigation. (Record, Vol. I, pp. 237-8.)

And having so accepted it, the court proceeded to apportion the undivided freight operating expenses upon the "revenue theory," and then charged to State freight 50 per cent. more, as its additional cost, thus leaving an actual net deficit of $225,565.49, or $338,099.20, if the law of 1907 had been observed; thus virtually adopting the calculations of complainant's Exhibit 100. (Record, Vol. V, pp. 5096-7.)

If the lowest minimum to which Mr. Sturgis would listen, "three times as much" had been applied, the deficit on the State business would have been $1,488,503.89. (Record, Vol. V, p. 5097.)

But aside from the inherent and palpable incorrectness of this statement, there is another reason for its rejection. It does not cover a fairly representative period of the company's operations. The period embraced is the year ending June 30, 1908. Nine months of that time was an era of great depression in railroad business and all kinds of industrial pursuits. It is a fact of which any court in the country will take judicial notice. But this record affords abundant evidence of it. On October 1, 1907, the Missouri Pacific Railway System had on its payroll 37,000 men. By March 1, 1908, 18,000 or 19,000 of them had been discharged, and of those who remained many worked only half the time. (Record, Vol. V, pp. 4283, 4319.) Other roads also suffered from

the depression in business. (Record, Vol. IV, pp. 4027-8, 4106, 4117, 4262, 4422.)

According to the report of the Interstate Commerce Commission, the ton mileage of all the railroads of the United States for the year ending June 30, 1908, was 18,153,419,370 ton miles less than of the preceding year, causing a decrease in freight revenue alone of nearly $137,000,000. (Twenty-third Annual Report, pp. 63-4.)

For this additional reason the court below erred in making a finding based upon the business of the company for the year ending June 30, 1908. It was an abnormal period.

N.

MR. TALIAFERRO'S SUMMARY.

Mr. Taliaferro, one of the experts for the State, had prepared, in writing, a compact statement of the views of the experts of the State upon the situation as a whole. It was offered in evidence. (Record, Vol. IV, p. 4550.) And as it reflects the opinions and the attitude of the State officers in this litigation, it is here reproduced. (Record, Vol. V, pp. 4988-96.)

> If the property exists for the purposes for which it is being used, then there is no reason why State business should be charged with *more* than a gross earnings proportion of the cost of supplying facilities; and if the amount of use is to be the basis, State business should be charged according to the number of ton miles made. In the Missouri Pacific case, while Mr. Stith was on the stand

(page ——), the Master said that the property did exist for the purpose for which it was being used, and that any other view of the matter was purely academic. The revenue per ton mile on State freight being nearly twice that on interstate freight, and the earnings per passenger per mile being greater on State business than on interstate business, it follows that if the earnings be taken as a basis for dividing the value of the property, State business is by this one step charged with much more in proportion to the amount of use than interstate business.

The Revenue vs. the Ton-mile and Passenger-mile Basis for Dividing Expenses.

The use of the revenue as a basis for determining the cost of the State and interstate business, violates every principal of cost finding. With the number of State and interstate ton miles, and the number of State and interstate passenger miles, the total expenses of doing the freight and passenger business, can be divided between State and interstate after proper allowance has been made for the excess cost per ton mile of State over interstate freight, and the smaller cost per passenger mile of State than interstate business. The expenses follow, directly, the work performed. If a division is operated at a low cost per ton mile this benefit accrues to both State and interstate business. On the other hand, where the cost is high it operates against both the State and interstate. Every facility provided by the company is used in both classes of business—State and interstate, and both classes are carried on all kinds of trains—through trains as well as the local trains. The difference in cost is not all a matter of opinion.

The ton mile basis does not ignore the elements of cost. The railroads work up their statistics on the ton mile basis and the ton mile costs mean a great deal to the operating man. An important part of the accounting business is the putting in of cost systems, and we say that the ton mile and the passenger mile are the best units that can be used in dividing expenses between State and in-

terstate business. We do not say that the ton mile costs on one road should be compared with those on another; undoubtedly, there would be wide variations between the figures of different roads. One of the greatest weaknesses of the revenue basis lies in the fact that the railroads must all charge the same rates between the same points, whereas the cost of moving business between those points by different routes varies greatly. What we say is that the same tracks, the same cars, the same engines, the same crews—in fact, all facilities of the railroad, are used for both State and interstate business. The ton miles and passenger miles and the total expenses for any period can be worked out. It then becomes necessary to divide those expenses between the various classes of business, and the only thing that has to be considered is the *difference* in cost. If the average on all business is high, the cost of State and interstate will both be high; if low, both the State and interstate costs will be reduced. Other reasons why the ton mile and passenger mile are the proper units are these: The railroads are organized and operated for the purpose of moving freight and passengers from one point to another, and from every point to every other point. Every kind of expense incurred relates directly or indirectly to the *movement* of the traffic; therefore, the length of the haul is the first thing to be considered. The ton mile and passenger mile give first consideration to the length of the haul. We do not say that it costs so much per ton or so much per car, but so much per ton mile. There is interstate business that costs much more per ton mile than State business, because it is in less than car load lots, and hauled a shorter distance than the State freight. It is only by working out the *average haul* of the two classes, and taking into consideration the proportions of less than car load and car load business in each class, that an intelligent estimate of the difference in cost can be made. The revenue basis largely ignores the length of haul; whole sections of the country are grouped and the same rates applied to all points in making tariffs. Traffic

men admit that the cost of the service rarely enters into their calculations; rather, they consider the value of the commodity, and the value of the service to the patron. Rates are frequently changed to meet competition from an entirely different direction, and the statement that cost changes as the charge for the service changes is on its face absurd. If the revenue derived had any direct relation to the cost of the service, the Missouri part of all railroads should be operated at about the same per cent of expenses to gross earnings; but we know that these figures vary from less than 60 per cent on the Cotton Belt road to more than 100 per cent on some of the other roads.

Mr. Doddridge stated that having satisfied himself of the extra cost in transportation expenses, he knew of no better basis for dividing maintenance, traffic and general expenses. We think there would be just as much reason for dropping the extra expense where it does occur, as for adding it where it does not occur.

The operating expenses are divided under five general heads, as follows:

Maintenance of Way and Structures.
Maintenance of Equipment.
Traffic Expenses.
Transportation Expenses.
General Expenses.

Maintenance of Way and Structures.

A ton of interstate freight gets just as much use of each mile of track over which it passes as a ton of State freight, for the reason that it takes as many cars to carry a given amount of interstate freight as to carry the same amount of State freight. The only tracks not used by trans-state freight are the team and warehouse tracks at stations. The maintenance of such tracks is a small item when compared with the maintenance of main tracks, second tracks and passing sidings—small, whether considered in the aggregate or per mile of such tracks. As a road runs—through deep cuts and tunnels, over large and small ravines, rivers, creeks, etc., large expenditures are necessary for

ditching, widening embankments, surfacing trestles, painting bridges and ballasting, but these expenses are rarely incurred in connection with team and warehouse tracks. If the use of tracks is to be measured by the dead load (and this is undoubtedly proper), it will have to be admitted that there is more less than car load State freight than interstate freight, in proportion to the total tonnage of State and interstate freight; but State car load freight is loaded much more heavily on the average than interstate carload freight. This could be assumed from the fact that it is the lighter classes of commodities that go the longer distances—such as live stock, dressed meats, fruits, cotton, etc., while the heavier commodities, particularly coal, sand, brick, stone, etc., travel shorter distances on the average.

Exhibit No. 8 in the Missouri Pacific case shows the number of loaded cars handled at 88 stations on that road in the month of October, 1905—the tonnage being divided between State and interstate. The total number of tons divided by the number of cars used, gives an average loading of twenty-seven tons for State and 22½ tons for interstate freight. The average load of State freight was 20% over the interstate. It can be almost exactly shown by figures that there could not be any more use of the track by State freight than by interstate freight, on a ton mile basis.

Exhibit No. 36 in the Burlington case shows that 58 per cent of all the tons handled on that road in the month of September, 1906, were second class interstate, and that only 27 per cent were trans-state. This indicates that while the trans-state business would not require the establishment and maintenance of so many freight and passenger stations (although telegraph operators would have to be stationed not more than ten miles apart, where the through business was heavy) the stations are established and maintained more for the second class interstate business than for the State business. In Exhibit No. 36, referred to above, the tons of second class interstate were more than four times as great as the tons of State freight; so

Maintenance of Equipment.

The only theory upon which State freight could be charged with a larger cost per ton per mile for maintaining equipment would be that it received more use of the equipment. As 95 per cent of all the tonnage of the railroad is in car loads, and as the State car load freight is loaded more heavily on the average, than the interstate car load freight, it is difficult to see how there could be more expense in connection with the State freight than with the interstate freight. As to the delay to cars at the stations being greater in the case of State than of interstate freight—this goes to the cost of supplying the equipment rather than to maintaining it, and should not be considered as part of the operating expense. The interstate freight is handled longer distances, on the average, than the State freight (far enough to get the use of one divisional point in addition to the originating or delivering stations), and we think it fair to assume that there is no greater cost per ton per mile for maintaining cars for State freight than for interstate freight. As to the maintenance of equipment for the handling of passenger traffic, it can be stated that if the cost were divided on the basis of passenger miles, it would probably be more in the case of State business than interstate business, because more interstate passengers are handled in sleeping cars than in the case of State business.

Traffic Expenses.

It must be plain to everyone who is at all familiar with the railroad business that the time of the traffic department—a department which is engaged in soliciting business, getting out tariffs, keeping competitive rates in line with those of other roads and routes, etc., is chargeable in much greater proportion per ton mile to the interstate business than to the State business. The farther a shipment goes, the more competition it meets, and the more likely it is to be interstate than State business. The local or State business largely takes care of itself; such of it as is competitive has

to be looked after with special care, but the large proportion of it practically takes care of itself. The rates seldom change; the freight is handled when it is convenient for the railroads to handle it; it takes second place when competitive freight has to be handled; and in every way, speaking generally, it is given less attention than the interstate or long haul business. For the above reasons we think that the traffic expenses on the State freight business are less per ton per mile than on the interstate freight business.

In the passenger business the above reasons (for thinking that the expense is less on State business per passenger mile than on interstate) will also apply.

Transportation Expenses.

The transportation department deals particularly with the movement of freight and passengers. While it intends to handle all classes safely and expeditiously, its greatest care and concern are in connection with the competitive business, and as the long haul business is more highly competitive than the short haul, it is fair to assume that it is more apt to be interstate than State. It follows, therefore, that the expenses included under this head, such as superintendence, dispatching trains, stationery and printing, etc., are less per ton mile and per passenger mile on State business than on interstate business. The extra expenses of State freight business must be in connection with the station, yard, train and engine service.

Station Service: There is more expense per ton mile, in the case of station and yard service, on State than on interstate freight, because the haul is shorter, thus giving fewer ton miles over which to spread the station expenses connected with a particular shipment. As the average haul of State freight is more than half the average haul of interstate freight, the station expenses should not be more than double, per ton per mile, because all freight must get some use of every terminal and division point through which it passes. Second class interstate freight is hauled more than one

hundred miles, on an average, and as division points are about one hundred miles apart, it must get not only the full use of one terminal, but the partial use of another. First class or trans-state would get the use of one or two large terminals, and one or two division points, in many cases. If the company had nothing but trans-state business it would not have to have so many stations, but it would have to maintain telegraph offices not more than ten miles apart. Many of the small stations have only one man who does the telegraphing, looks after the freight, sells tickets, etc. Assistance, when any is needed, is frequently forthcoming without cost to the company. According to Exhibit 36 there were over four times as many tons of the second class of interstate as of State freight handled in Missouri in September, 1906. This shows that on an average, each station must have given twice as much attention to interstate as state freight, and it cannot be said that any kind of expense of running the stations could have been done away with if there had been no State freight. However, as the average haul of State freight is only about half that of interstate, the station expenses would be greater per ton per mile on State freight than on interstate, and it might be twice as much. We do not admit that trans-state freight gets no use of any terminal in the State. In Missouri, particularly, where the large cities are on the east and west borders of the State, a great deal of service is given to cars passing through these terminals, and it frequently takes days to get cars through them. A large part of the time of the clerical force at large stations and junction points, is taken up in the making and checking of billing covering other than local shipments. There is no trouble in handling the local shipments, but billing over several roads is complicated.

In the passenger business, the average haul of the interstate is about three times that of the State passenger, and the cost for station service may be only about one-third the cost of the State passenger.

Yard Service: This service consists of breaking up and making up trains, placing cars for loading and unloading, and the general work of shifting and checking cars in the terminal and division yards. There is no yard service at the local stations, as the shifting at these stations is done by the engines attached to the local trains. The difference between the service given a car in State traffic and in the second class traffic is this, that on State shipments the car has sometimes to be placed for loading and taken out when loaded, then placed for unloading at destination and taken out when unloaded, while the car for the interstate shipment may be saved one of these handlings. A trans-state shipment has to be taken into the company's train at St. Louis or Kansas City, if routed through either of these points, and hauled through one or more divisional points.

There is a class of State business which gets only the use of one terminal on a particular road, as the word terminal is used in this case by the railroad companies, and that is business starting in the State on one road, destined to a point on another road.

Considering all of the conditions named above we say that the State freight does not cost more than twice as much per ton per mile as the interstate business for yard service.

Yard service would not be three times as much per passenger mile, because of the handling of cars in making up passenger trains which contribute very little to the State business.

Train and Engine Service: If the through and local trains carried the same proportions of State and interstate business there could be no difference in the cost of train and engine service in handling State and interstate business. It appears, however, that a larger proportion of the total State tonnage than of the interstate tonnage is carried in local trains, and this would tend to increase the cost per ton per mile of the State business for train and engine service. It should be borne in mind that the less than car load ton miles are only

about six per cent of the total ton miles, the interstate being about three times the State.

The cost of train service depends, as has been suggested upon the weight to be hauled, and in this connection the proportion of dead weight to the total weight should not be overlooked. Now as 95 per cent of all the tonnage is car load business, and State car load freight is loaded 20 per cent heavier, on the average, than interstate car load freight, it is evident that the percentage of dead weight to the total weight is as high in the case of interstate as in the case of State freight. The "waste space," so often referred to, could only apply to the less than car load business, because there is no "waste space" when cars are loaded to the minimum required in the classification governing the rates. Admitting that a larger percentage of State than of interstate freight, is in less than car loads, and that the less than car load freight averages only 3 to 6 tons per car, it is seen that this "waste space" so often referred to is more than made up by the higher average loading of State car load freight than of the interstate. The short haul has nothing to do with the cost of train service, except as it might be responsible for the setting out of cars where others could not be taken into the train. No one would contend that through and local train service costs the same per ton per mile, because the through trains carry more tonnage, and the capacity of their engine is more nearly employed; but through trains carry both State and interstate freight, and local trains carry both State and interstate freight, and the only reason why the State freight costs more per ton per mile for train service, than interstate freight, lies in the fact that the local trains haul a larger percentage of the total State than of the total interstate freight. We think the excess cost per ton mile of State freight over interstate freight, due to the local trains carrying a greater percentage of the total State than of the total interstate freight, is not more than 50 per cent of the cost per ton mile of interstate freight.

In the handling of passengers the State pas-

sengers cost much less per passenger mile than the interstate, for train and engine service, because of the greater number of coach passengers in State traffic.

Arbitrary Train Service: While local trains are referred to as arbitrary trains, this can only apply to the freight business, because through passenger trains are regularly scheduled and must run whether there is any business or not. Moreover, the usually carry the same equipment regardless of the number of passengers, while in the local passenger service a car can be added or taken off at the last moment. As the local freight trains carry much more interstate freight than State freight, it would seem that the arbitrary freight train service is due more to the interstate than to the State business. Again, if it were not necessary to expedite the competitive traffic, the local trains could carry much of the freight now handled by through trains.

Light Mileage: As the freight business usually moves in one direction, according to the season, much empty car mileage is necessary in order that cars may be taken to points where they can be loaded; and it sometimes happens that engines run light (without any cars whatever except the caboose) for the purpose of bringing back trains. In the local service this is not necessary, because the business is not so highly competitive (if competitive at all), and the local trains can supply the cars for it. They may not supply such cars for days after they are ordered, but the patrons of the road cannot help themselves.

Cost of Stopping Trains: If the stopping of the passenger trains and the shifting of local trains add so much expense, then it might be considered that they add more to the cost of interstate than to State business. The interstate business is handled longer distances on the average than State business, and as much of it is obliged to be handled in local trains it not only should be charged with the cost of stopping and shifting on its own account, but also with a proportion of the stops and of the shifting necessary at intermediate points.

General Expenses.

The remarks made elsewhere in connection with traffic expenses and with the supervision of transportation will apply here. The company officials are engaged principally in providing for, securing and expediting the movement of competitive freight. The clerks in the auditor's office have no trouble in revising the billing for local shipments where the company gets all of the revenue, and this kind of work requires a very small part of their time. It is on waybills covering shipments traveling long distances and over several roads that so much time is spent, and after a waybill is revised, it has to be settled in joint account, and this takes time.

These remarks also apply to the local as compared with the through or competitive passenger business. For the reasons given above, and for other reasons which will readily suggest themselves to those familiar with the railroad business, it is evident that the general expenses cannot be as much per ton mile or per passenger mile on State business as on interstate business."

II.

THE STATUTE IS PRESUMPTIVELY VALID, AND THE COURT WILL NOT INTERFERE IF THE QUESTION BE DOUBTFUL.

This is the established doctrine of the court, and the appellants contend that the rule should be applied in this case.

"But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction, unless they are so plainly and palpably unreasonable

as to make their enforcement equivalent to the taking of property for public use without compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, *clearly and beyond all doubt*, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

San Diego Land and Town Company vs. National City, 174 U. S. 739, 754.

"There can be at this day no doubt, on the one hand, that the courts on constitutional grounds may exercise the power of refusing to enforce legislation, nor, on the other hand, that that power ought to be exercised only in the clearest cases. The constitutional invalidity should be manifest, and where that invalidity rests upon disputed questions of fact, the invalidating facts must be proved to the satisfaction of the court. * * * * * * * * * * Disregarding for the moment all the errors which were committed in the court below, the decision of this cause may be rested upon a broader ground, which is clearly indicated by the previous judgments of this court. The jurisdiction which is invoked here ought, as has been said, to be exercised *only in the clearest cases*. If a company of this kind chooses to decline to observe an ordinance of this nature and prefers rather to go into court with the claim that the ordinance is unconstitutional, it must be prepared to the satisfaction of the court that the ordinance would necessarily be so confiscatory in its effect as to violate the Constitution of the United States. In Ex parte Young, 209 U. S. 123, the last word of caution by this court was said (p. 166): 'Finally it is objected that the necessary result of upholding this suit in the Circuit Court will be to draw to the lower Federal courts a great flood of litigation of this character, where one Federal judge would have it in his power to

enjoin proceedings by state officials to enforce the legislative acts of the State, either by criminal or civil actions. To this it may be answered, in the first place, that no injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by all the judges of the Federal courts.' The same thought, in effect, was expressed in San Diego Land & Town Company vs. National City, 174 U. S. 739, 754, 'judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.' "

City of Knoxville vs. Knoxville Water Company, 212 U. S. 1, 8, 16-17.

"In approaching the consideration of a case of this kind we start with the presumption that the act of the legislature is valid, and upon any company seeking to challenge its validity rests the burden of proving that it infringes the constitutional guarantee of protection to property. The case must be a clear one in behalf of the railroad company or the legislation of the State must be upheld."

Chicago, Milwaukee & St. Paul Railway Company vs. Tompkins, 176 U. S. 167, 173.

"It (this court) has also ruled that the determination of the legislature is to be presumed to be just, and must be upheld unless it clearly appears to result in enforcing unreasonable and unjust rates. * * * * The authority of the legislature to interfere by a regulation of rates is not an authority to destroy the principles of these decisions, but simply to enforce them. Its prescription of rates is *prima facie* evidence of their reasonableness."

Cotting vs. Kansas City Stock Yards Co., 183 U. S. 79, 91, 97.

"If the rates established by the commission are not conclusive, they are at least *prima facie* evidence of what is reasonable and just."

Reagan vs. Farmers' Loan and Trust Company, 154 U. S. 362, 395.

"But in order to bring taxation imposed by a State or under its authority within the scope of the Fourteenth Amendment of the National Constitution, the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation by its necessary operation is really spoliation under the guise of exerting the power of tax. As an act of Congress should not be declared unconstitutional unless its repugnancy to the supreme law of the land is too clear to admit of dispute, so a local regulation under which taxes are imposed should not be held by the courts of the Union to be inconsistent with the National Constitution unless that conclusion be unavoidable. All doubt as to the validity of legislative enactments must be resolved, if possible, in favor of the binding force of such enactments."

Henderson Bridge Company vs. Henderson City, 173 U. S. 592, 614-15.

"We do not feel warranted, by all that appears in this record, in declaring invalid an act of the legislature of Arkansas, which on its face appears to be a legitimate exercise of power, and which has not been shown, *by clear and satisfactory evidence*, to operate unjustly and unreasonably, in a constitutional sense, against the plaintiff in error."

St. Louis & San Francisco Railway Company vs. Gill, 156 U. S. 649, 666-7.

"As said by Chief Justice Waite in the Munn case, supra: 'Every statute is presumed to be constitutional. The court ought not to declare one unconstitutional unless it is clearly so. If there is

doubt, the expressed will of the legislature should be sustained.' Or, as has been elsewhere epigrammatically said, '*A doubt sustains the law.*'"

Mr. Justice Brewer in Dey vs. Chicago & Northwestern Railroad Company, 35 Fed. 866, 874.

"For the Federal courts to interfere with the legislative department of the state government, when acting within the scope of its admitted powers, is always the exercise of a delicate power, one that should not be resorted to unless the reason for doing so is clear and unmistakable."

Louisville & Nashville Railroad Company vs. Kentucky, 183 U. S. 503, 511.

These laws are presumptively valid enactments. The burden of proof is upon the complainant to show their invalidity. The fact that the burden may be a heavy one does not relieve the complainant from the necessity of fully sustaining it—not by opinions alone, but by facts, whenever facts are ascertainable, because opinions cannot take the place of facts. And if, in respect of any disputed question, opinions are admissible, those opinions must be based upon facts and given by witnesses who have such knowledge of the facts as gives their opinions a title to respectful attention.

Is the whole body of rates for the transportaion of freight within the borders of Missouri, as it existed before the enactment of this legislation, confiscatory? *For that is the contention of the complainant.*

The laws of 1905 and 1907 would, it is true, have somewhat reduced its revenues. But in view of the assertions put forward regarding the operations of the company, this loss is of comparatively small consequence. The claim is made that *before* the enactment of the laws, the complainant was losing every year, vast sums of money,

represented by figures running into the millions, on its intrastate freight business.

The relief asked for by the complainant in this suit can be granted only upon the condition that it establish "clearly and beyond all doubt" that the rates fixed by this law, in connection with other rates established by the Board of Railroad Commissioners, will not afford to it a reasonable return upon the value of its property employed in that part of the service.

That the complainant lost any sums of money on its intrastate freight business in Missouri before the enactment of this legislation, is a startling proposition—*a fortiori* that it sustained the enormous losses represented by the figures exhibited by its General Auditor. *In limine* the inherent improbability that any such losses were sustained, is very great.

Not only is the complainant met by the presumption in favor of the validity of the law, but by the natural unlikelihood of the business having been done at any loss.

The testimony in regard to these losses staggers credulity. These disastrous consequences resulting from the State freight business must have extended over a period of many years. Notwithstanding such misfortunes, the company, from the operations of its entire system, profited handsomely, as has been seen. It had, at the close of the year 1904, accumulated a surplus of over $60,000,000. (Record, Vol. I, pp. 726-7.)

If such losses were sustained in Missouri in the complainant's intrastate business they must have been much larger in proportion in other parts of the territory through which its system operated. Such prosperity of the system as a whole seems irreconcilable with the existence of such losses. Missouri is one of its most productive states. Density of population or traffic is an element always con-

sidered in reckoning upon the probable success or otherwise of any railroad enterprise. The record affords some evidence upon this subject. In no state in the territory in which the complainant operates, excepting only Illinois, is density of traffic nearly as great as in the State of Missouri. This is shown by the following tabulation (Record, Vol. II, pp. 2033-4; Exhibit 22, Vol. III, p. 2411):

States.	Number of miles of line per 100 square miles of territory.*	Number of miles of line per 10,000 inhabitants.*	Population per mile of road.
Arkansas	7.78	29.44	339
Indiana	19.26	25.75	389
Illinois	20.75	22.56	443
Iowa	17.77	41.34	242
Kansas	10.79	56.09	178
Minnesota	9.86	41.75	239
Missouri	11.22	23.23	431
Michigan	15.08	33.48	299
Nebraska	7.58	51.10	196
Ohio	22.56	20.70	483
South Dakota	3.97	71.01	141

And the fact that legislative rates have been found confiscatory in other cases, aids little in the solution of the disputed questions in the case at bar.

Conditions existing many years ago in the sparsely settled regions of Nebraska and the Dakotas, afford no index to the present situation in the rich, prosperous and densely populated State of Missouri, where development in almost every field of human activity has attained a high level.

In many respects the evidence offered by the complainant to support its contention as to the increased cost of

[illegible] of the most indefinite and unsatisfactory character. Witnesses allowed themselves a very wide range. The difference between "three times" and "seven times" means millions.

It is not to be wondered that the record discloses an apparent inclination on the part of some of the witnesses for the complainant to swell the figures representing the expenses of the State freight business, by loading that business with burdens which do not properly belong to it. This is illustrated by the statements of its operations for the years 1904 and 1905, offered by the complainant. (Record, Vol. I, pp. 267-8.)

In these, all the business operations of the company in the State were charged with expenses under the name of "proportion of rental," amounting to very large sums. This proportion of rental was really dividends on capital stock and interest on bonds.

This action was originally brought in the name of the Chicago, Burlington & Quincy Railway Company. That company had been incorporated in the year 1901. (Record, Vol. I, pp. 275-6.) It had a paid up capital stock of $[illegible], its officers were substantially the same persons as those of the railroad company. (Record, Vol. I, pp. 277-8.)

In November, 1901, it had leased from the Chicago, Burlington & Quincy Railroad Company all its properties, and agreed to pay as rent therefor, among other things, the interest on all its bonds, and annually, a sum equivalent to [illegible] upon the par value of the capital stock of the railroad company. It was this so-called "rental" which the auditor of the company dealt with as operating expenses, under the instructions fastened as a burden upon the State freight business. And in his opinion, and in the opinion of counsel for the complainant, it was a legitimate charge upon that business, to be deducted, with

other expenses, from the gross earnings, before the net revenue of the business could be ascertained. (Record, Vol. I, p. 247.)

Afterwards the lease was canceled, and the Chicago, Burlington & Quincy *Railroad* Company substituted as complainant in this suit.

The facts regarding this *lease* are commented on more fully hereafter in that part of this brief which deals with the passenger rate law.

There is natural unwillingness to accept as a fact the assertion that the handling of the State business caused such huge deficits—a fact so seemingly inconsistent with the eminently successful results which the record shows have attended the operation of the system as a whole. Its existence requires a reversal by the mind of all its preconceived notions upon the subject. The view which the mind is invited to entertain is entirely novel and unexpected. The mental vision must re-adjust itself to embrace a new perspective to which it is wholly unaccustomed.

On the other hand, men whose knowledge, capacity for the work, thoughtfulness, painstaking care and candor are conspicuous in this record, are firmly convinced after a thorough investigation of the subject, and so express their opinion, that the complainant, instead of being a loser on account of its State freight business, made large sums of money, fully adequate for a reasonable return upon the value of its property. The methods, in detail, by which these conclusions were reached, were formulated in tabulated statements, which appear in the record.

Can it, therefore, be said, upon this evidence as a whole, that "the case presents clearly and *beyond all doubt* such a flagrant attack upon the rights of property," as to

justify this court, within the rule of action which it has established for itself, to annul the law of a State?

Can it be fairly said, upon this evidence, that, as a whole, it leaves *no doubt*?

If the evidence as a whole leaves the mind in doubt, the decree of the circuit court ought to be reversed and the bill of complaint dismissed to the extent that it concerns the freight rate laws of 1905 and 1907.

Because, as Mr. Justice Brewer said, in a case already referred to, "*A doubt sustains the law.*"

III.

THE COMPLAINANT DID NOT SHOW THAT IF IT HAD CHARGED THE RATES FIXED BY THE ACTS OF 1905 AND 1907, AND THE OTHER RATES ALLOWED BY LAW, IT WOULD NOT HAVE REALIZED A REASONABLE RETURN FROM ITS PROPERTY.

The burden was upon the complainant to show that charging for the commodities mentioned in the acts of 1905 and 1907, the maximum rates fixed by those acts, and for freight not dealt with by those acts, the rates allowed by law, it would not have realized a reasonable return from its property.

Those acts fixed maximum rates only for commodities in car load lots. Rates upon all other classes of freight transporter by the complainant were left untouched by those enactments.

Of the total volume of intrastate freight handled by the

complainant during the year 1904, only 35 per cent. would have been affected by that act; in 1905, only 32 per cent. (Record, Vol. I, pp. 237-8.)

Of the entire intrastate freight handled by the Missouri Pacific Railway Company in 1904, only 13 or 14 per cent. would have been affected. (Record, Vol. II, p. 1506.)

Very much the larger proportion of the revenue derived by the complainant from the transportation of State freight is realized from the carriage of freight wholly without the purview of these laws. Rates upon this vast volume of freight are, under the laws of the State, within the control of the Board of Railroad and Warehouse Commissioners, by virtue of the provisions of an act approved April 6, 1903. (Missouri Session Acts 1903, p. 132.)

Section 1194a provides, in part, as follows:

> "The board of railroad and warehouse commissioners are hereby authorized, empowered and required to fix, maintain and establish just and reasonable freight rates on all classes of freight from, to and between all points and stations upon and along all lines of railroads in this state; and said board is authorized and empowered to reduce, change or modify any and all such freight rates so fixed and established as hereinafter provided."

The Board, under the authority conferred upon it, exercised its functions and did fix rates. But the complainant did not charge the maximum rates allowed by the acts of 1905 and 1907, nor did it charge on the remaining volume of freight the maximum rates fixed by the Board of Railroad and Warehouse Commissioners. (Record, Vol. I, pp. 588-9, 601, 615, 270.)

Under a proceeding of this nature the rates must be considered as a whole—all the rates; not merely those fixed by the acts of 1905 and 1907, but also those fixed by the Board of Railroad and Warehouse Commissioners. It is not enough

for the complainant to show, if it can, that the rates fixed by the acts complained of are lower than they should be. The whole schedule of rates for all classes of freight must be considered, and their unreasonableness, as a whole, established. It is not sufficient for the complainant to show what were its actual revenues realized by charging rates less than those allowed by the whole body of legal rates. The evidence does not show what the gross revenue of the complainant would have been if it had charged the full rates permitted by law and the schedules of the Railroad Commissioners. There is, therefore, a failure of indispensable proof, because *all the rates* must be taken into account.

Minneapolis and St. Louis Railroad Company vs. Minnesota, 186 U. S. 257.

In the case just referred to only the rate upon coal in car load lots was assailed, and the court said:

> "Notwithstanding the evidence of the defendant that, if the rates upon *all* merchandise were fixed at the amount imposed by the Commission upon coal in carload lots, the road would not pay its operating expenses, it may well be that the existing rates upon other merchandise, which are not disturbed by the Commission, may be sufficient to earn a large profit to the company, though it may earn little or nothing upon coal in carload lots."

The case came to this court by writ of error to the Supreme Court of Minnesota. The judgment was affirmed. That court, in the course of its opinion, said:

> "Evidence should have been introduced on which a finding could have been based to the effect that there was no class of traffic on defendant's road upon which rates could be made, or actually had been made, and were being collected, which would

or had made good the loss of revenue resulting from the order. Nothing of this sort was attempted."

State vs. Minneapolis and St. Louis Railway Company, 80 Minn., 191.

What the complainant would have received if it had charged and received the rates allowed by law, this record does not disclose. This proof is essential to the establishment of the complainant's claim for relief.

Nor can it be urged as an excuse for not charging the full maximum rates, that competitive or other conditions made it unwise or injudicious or impracticable. If it be true that such conditions prevailed in the State of Missouri as to intrastate freight, those conditions are the result of the action of the complainant and its associate complainants in the seventeen other cases. If there be such difficulties it is because they, themselves, by agreement with each other, created them.

The observations of Mr. Justice Brewer in Ames vs. Union Pacific Railway Company, 64 Fed. 165, upon this point are here pertinent:

"Railroad companies cannot plead their own convenience or the effects of competition between themselves and other companies, in restraint of the otherwise undeniable power of the state."

IV.

THE ACTION WAS PREMATURELY BROUGHT.

The act of 1905 took effect, under the provisions of the Constitution of the State ninety days after the adjournment of the General Assembly, that is to say, on June 16, 1905.

On that day the bill of complaint was filed and a restraining order issued which enjoined the Railroad and Warehouse Commissioners from "taking or making out or printing or delivering any schedule of rates for complainant containing the maximum rates fixed by said acts."

As has been stated the Board of Railroad Commissioners had unlimited discretion in the matter of rates affecting much the larger volume of freight transported over complainant's railroad—two-thirds of it at least. They were unfettered in their discretion as to this volume of freight, by any legislative rates.

They had on June 16, 1905, of course, taken no action whatever, because the law, as has been stated, took effect upon that day. Neither had they announced any intention as to their purpose in the matter of making new schedules for the transportation of freight. They might, if they had not been prevented by this order, have hade such new schedules, so increasing the rates in respect of which they had jurisdiction to act that their new schedules, taken in connection with the limitations imposed by the act of 1905, would have resulted in a body of rates, as a whole, which would have been remunerative (Not, of course, here conceding that the present rates are unremunerative.)

But the complainant did not await the action of the Railroad Commissioners. It should have done so, and until the Board had exercised its function of rate-making by promulgating schedules, or had announced its purpose so to do, it should not have been enjoined; for the obvious reason that the action of the Board, when taken, might have been unobjectionable; and the restraining order which, as such, and later, in the form of a preliminary and now as a final injunction, has tied the hands of the Railroad Commissioners ever since June 15, 1905, ought not to have been issued, and the complainant's bill should have been dismissed.

In Stone vs. Farmers Loan and Trust Co., 116 U. S. 307, 335, this court said:

> "As yet the commissoners have done nothing. There is, certainly, much they may do in regulating charges within the State, which will not be in conflict with the Constitution of the United States. It is to be presumed they will always act within the limits of their constitutional authority. It will be time enough to consider what may be done to prevent it when they attempt to go beyond."

And again, in McChord vs. Louisville & Nashville Railroad Company, 183 U. S. 483, 502:

> "The result of these considerations is that the duty of enforcing its rates rests on the Commission and that none of the consequences alleged to be threatened can be set up as the basis of equity interposition before the rates are fixed at all."

Chicago, Burlington & Quincy Railroad Company vs. Winnett, 162 Fed. 242.

Southern Pacific Railroad Company vs. Board of Railroad Commissioners, 78 Fed. 236.

V.

THE ACTION OF THE COURT BELOW IN DIVIDING THE COSTS WILL NOT BE REVIEWED HERE.

In equity, costs are not imposed, as, of course, upon the unsuccessful party. The disposition of the matter of costs is discretionary with the court. And the circuit court, in its supplemental opinion (Record, Vol. V, pp. 5327-8), mentions some of the reasons which induced its action.

This court has said:

"In actions at law, it is a general rule that the losing parties, or the parties against whom judgment is rendered are to pay the costs; and no apportionment of the costs is made between them. Each is liable for all, whatever may be their respective interests in the subject-matter of the suit. In equity it is different. There the court has a discretion as to the costs, and may impose them all upon one party, or may divide them in such manner as it sees fit."

Kittredge vs. Race et al., 92 U. S. 116, 121.

DuBois vs. Kirk, 158 U. S. 58, 67.

Nebraska vs. Iowa, 143 U. S. 359, 370.

Consolidated Mining Co. vs. Baker, 131 Fed. 989.

Western Coal & Mining Co. vs. Petty, 132 Fed. 603.

Ambler vs. Auditor General, 38 Mich. 746.

"Costs in chancery do not depend upon any statute, nor do they absolutely depend upon the event of a cause. They depend upon conscience, and upon a full and satisfactory view and determination of the whole merits of a case. They rest in sound discretion, to be exercised under a consideration of all the circumstances."

Chancellor Kent in Eastburn vs. Kirk, 2 Johns. Ch. 317, 318.

VI.

THIS COURT WILL NOT CONSIDER THE QUESTIONS RAISED BY THE COMPLAINANT'S ASSIGNMENT OF ERRORS ON ITS CROSS-APPEAL.

The complainant in the court below obtained all the relief which it sought. The officers of the State were permanently enjoined and the laws attacked were declared unconstitutional and void. If the questions raised by the complainant's assignment of errors had been decided by the court below in its favor, the decree could have been no more sweeping; the complainant could have obtained no greater or further relief than was granted to it. The questions raised by its assignment are, therefore, simply moot questions. If this court were to take complainant's view in respect of them, it could do no more than affirm the judgment of the circuit court.

Rogers vs. Penobscot Mining Co., 154 Fed. 606.

PART II.

SUPPLEMENTAL BILL.

THE SUPPLEMENTAL BILL.

The original bill was based entirely upon the act of 1905, which prescribed a maximum schedule of rates for the carriage of certain commodities. The bill charged that this maximum schedule was so low as to be confiscatory. The relief prayed was that the act be declared unconstitutional, unenforceable and not binding upon complainant. As an incident to this it was further prayed that the defendants Knott, Rice and Wightman, the Railroad Commissioners of the State, and their successors in office be enjoined from taking any step to put in force the rates prescribed by the act, and that the defendant, Hadley, as Attorney-General, and other prosecuting officers of the State be enjoined from prosecuting any suit against complainant to enforce against it any penalties based upon its failure to recognize the act, and that the defendants, Daily, Davis and Robb, who were described as shippers over the complainant's road, be enjoined from instituting any suit or taking any steps to collect any penalties or damages for any violation of the act by complainant.

There was a general prayer for relief, but no other specific prayer.

The taking of evidence under this bill was completed and the case was made ready for submission. It did not appear by the evidence that the Board of Railroad Commissioners had taken or would take any steps to enforce the act, or that the Attorney-General or any prosecuting officer had instituted or would institute any prosecution under the act, or that the shippers named would institute any suit for penalties or damages, or even that they had

made any shipments upon which any suit by them could be based.

The General Assembly of Missouri on March 19th, 1907, passed an act repealing the act of 1905. This later act became effective June 14th, 1907. From and after that day the rates prescribed by the act of 1905 were no longer in force. There was a saving clause in the act of 1907 as to all liabilities or penalties theretofore incurred for failure to comply with any law of the State, and this undoubtedly saved penalties and liabilities, if any had been incurred, under the act of 1905. For every other purpose, except perhaps the question of costs, the act of 1905 was dead.

In addition to repealing the law of 1905 the General Assembly of Missouri in 1907 by the same act prescribed a maximum schedule of rates for commodities which was confessedly higher than the schedule of 1905, and it made the violation of this new act a misdemeanor punishable by a fine of not to exceed five thousand dollars. It passed another act which also became effective June 14th, 1907, prescribing a maximum of rates for carrying fruit. Violation of this act was punishable by fine not exceeding one thousand dollars. It passed a third act providing that a shipper of live stock by carload lots should be entitled for himself or his employe, to a round trip ticket to and from the points designated in the bill of lading. Violation of this act was visited with a penalty, payable to the shipper, of not less than three hundred and not more than five hundred dollars. It passed a fourth act fixing a maximum rate for passenger travel at two cents per mile on the railroads classified as "A," "B" and "C" and four cents per mile for railroads falling in class "D." This law also became effective June 14th, 1907. Violation of this act was punishable as a misdemeanor by fine of not less than one hundred nor more than five hundred dollars.

On the 12th day of June, 1907, the complainant filed a motion for leave to file "an amended and supplemental bill seeking to enjoin the enforcement of the various acts of the legislature regulating rates, adopted at the session in 1907, and making as additional parties defendant H. S. Hadley, Railroad Commissioner (he had at the general election in 1906 been chosen to succeed Joseph P. Bird), and the county judges and treasurers of the counties through which each of the complainant's lines run, together with citizens traveling upon the road of the complainant as passengers, all as will be more fully shown by the amended and supplemental bill to be presented upon the hearing of this motion." (157.)

On the same day notice was served on H. S. Hadley, solicitor for defendants, that the complainants would, on June 13th, 1907, at ten o'clock a. m., ask leave of court to file an amended and supplemental bill in form substantially as shown in copy attached.

On the 13th day of June the following order was made:

"The complainant upon this June 13, 1907, asked, pending a hearing of the application to file an amended and supplemental bill, the general form of which has been submitted to the court, the right to temporarily file same and for a restraining order, that inasmuch as said application to file the bill for an injunction has been set and noticed for hearing upon June 14, 1907, at the first time convenient to the court, and it appearing to the court that it is desirable that a full argument be had after notice, yet that great harm might be done and much confusion arise if the *status quo* should be changed, and that it is to the best interest of the public and all parties interested that such *status quo* should be maintained until such hearing, it is therefore, upon the court's own motion, ordered that until further order herein the complainant, its officers, agents and employes be and they are hereby

restrained from putting in force the maximum freight and passenger rates provided by the legislative acts of 1907, mentioned in said bill and from complying with said acts, and the application for a restraining order will be heard with that for leave to file said amended bill." (1-58.)

On the 14th day of June the court made the following order:

"The complainant, upon this June 14, 1907, presented its amended and supplemental bill, and asked leave to file the same and for a restraining order, or temporary injunction. The court was advised by the Assistant Attorney-General, who appeared, that the Attorney-General is absent and desired to be heard, and in the meantime that suits were this day by the Attorney-General instituted in the circuit courts of the state to require the various railroad companies of the state to put in force the rates fixed by the acts of the legislature mentioned in the bill. It is thereupon ordered that the matter be set down for hearing upon the 15th day of June, 1907, at two o'clock p. m., and the supplemental bill herein shall be deposited with the clerk. And it appearing to the court that it is desirable that a full hearing be had of the various matters, yet that great harm might be done and much confusion arise if the *status quo* should be changed, and that it is to the best interest of the public and all parties interested that such *status quo* should be maintained until such hearing, it is therefore, upon the court's own motion, again ordered that until further order herein, the complainant, its officers, agents and employes, be and they are hereby restrained from putting in force the maximum freight and passenger rates provided by the legislative acts of 1907, mentioned in said bill, and from complying with said acts, and the application for a restraining order and temporary injunction will be heard with that for leave to file said amended bill." (1-59.)

The motion for leave to file the amended and supplemental bill was argued and submitted on the 15th of June, and on the 17th the court made the following order:

"This cause came on for hearing this 17th day of June, 1907, the parties appearing by their counsel in response to notice, and the court being fully advised in the premises, orders and adjudges:

1. *Complainant's motion for leave to file an amended and supplemental bill is sustained, and such leave is given, the same to be filed as of June* 11, 1907.

Upon such filing process shall issue so that if the court hereafter decides that the ends of justice require, and the rules of equity permit, the said bill may be treated as an amended, supplementary, ancillary, dependent or original bill.

To said bill, each of the parties named therein shall be and is hereby made a party.

2. Complainant's application for a temporary injunction is, as to the maximum freight laws of 1907, sustained. Until the further order of the court herein, the defendants and each of them are enjoined from doing any act, attempting to recover any penalty, seeking to enforce or having enforced, or asserting any claim or right under or by virtue of either of the maximum freight rate acts of 1907 mentioned in said amended and supplemental bill, to the end that each defendant as to each of said acts of 1907 be restrained as effectually as the defendants were enjoined by the temporary injunction heretofore issued as to and in connection with the act of 1905. By consent of the complainant, the injunction bond hertofore filed shall stand as applicable to this order, the same as if it were executed and filed this day.

3. As to the passenger act of 1907, the order heretofore entered upon the court's own motion shall remain in force until June 19th, 1907, at 6 o'clock a. m., at which time the rates fixed by said act shall be put and kept in force for three months without prejudice to the rights of either party for the purpose of ascertaining more definitely the extent that experience will show that the rates under

said act reduce or increase the earnings of complainant.

The court reserves the power, upon the appliction of any person interested, to hereafter make such further and other order upon this subject as it deems proper.

4. Pending the further hearing and final determination of this case, the complainant shall preserve and keep in existence its waybills for state freight." (1-60, 61.)

The bill was actually filed on the 17th day of June. The new parties were H. R. Oglesby, Railroad Commissioner, as successor to Joseph P. Rice, Joseph M. Patterson, Charles E. Moss and George Dodd, county judges of Jackson county, Arthur C. Warner, treasurer of Jackson county, and Thomas F. Van Natta and Vinton Pike, citizens and residents of Buchanan county.

Under the Constitution of Missouri, fines go to the school funds of the several counties, and the county judges and county treasurer were made defendants as representatives of the school fund. Van Natta and Pike, it was alleged, traveled frequently over complainant's road, and had "demanded and supported the passenger act," and they were made defendants as representatives of the entire traveling public.

The supplemental bill alleged that the Governor, in recommending, and the legislature, in passing the commodities act, "did so for the avowed purpose of increasing certain of the maximum rates of the act of 1905, which they conceived had in this litigation been proved to be confiscatory and could not be enforced;" also, that the legislature of the State, "without any fixed or definite knowledge upon the subject of rates, erroneously conceived that if the increase as aforesaid in the freight rates were necessary and were made, there could be a general equalization of rates by a decrease in the passenger rates, and so in substance

they could legally overcome and offset any advantage from the increase in freight rates by decreasing the maximum rates to be charged for State passenger traffic about thirty-three and one-third per cent, and thus while defeating pending legislation, the public as a whole would not be the loser." It was further charged that "the result was that at the same session and as part and parcel of one transaction, and substantially as one law, and to accomplish such purpose, there was passed and the Governor approved, an act herein called the passenger act;" and finally as to this phase of the case that:

> "11. The said Passenger Act was passed for the avowed purpose of reducing the state passenger rates of your orator so as to offset and overcome a supposed increase of certain of the state freight rates made under the Act of 1907, and the attempt was made to frame each act so as to avoid the injunctive relief in this and in each action heretofore instituted by the other railroad companies operating lines in Missouri. As your orator is informed and believes, the state and defendants now unjustly and improperly claim that since upon the face of these acts provision is only made for general penalties, there is no remedy by injunction; that the original bill can no longer be maintained, and that the state through its officers is entitled to have enforced the various statutory penalties for each shipment made and each passenger carried at a rate in excess of that fixed by the freight acts of 1907 and the said Passenger Act, as well as penalties under the abandoned Act of 1905." (1-70.)

It is alleged that the rates fixed by each of the acts of 1907 and by the passenger act, and as a whole are so unreasonable and confiscatory as to be void, and it is prayed that they be declared unconstitutional, unenforceable and not binding upon the complainant. All the relief asked in the original bill as to the act of 1905 is asked as to the acts of 1907, and that the temporary injunction issued un-

der the original bill be extended to include the legislation of 1907, and that it be made permanent. There was a prayer for general relief and for the issuance of a writ of subpoena. On the 25th day of June, 1907, a subpoena in chancery was issued, and at different dates, from June 25th to July 31st, was served upon the various defendants named in the supplemental bill. (1-62 to 73.)

The supplemental bill as originally filed does not charge the defendants, or any of them, with doing or intending to do any specific act in the way of enforcing the law, excepting what is set out in the 11th paragraph quoted above, and further, that the county judges and county treasurer and the two prospective passengers, Van Natta and Pike, intended to enforce the laws. These county officials and individual defendants have, however, no duties imposed or authority conferred upon them with respect to prosecutions under the law.

On July 16th, 1907, the complainant filed an amendment to its bills and in this, after reciting the motion for leave to file the amended and supplemental bill and the notice of the motion and the order of the court entered on June 13th, 1907, it was alleged that:

> "15. Afterwards, on June 14th, 1907, Herbert S. Hadley, Attorney-General of the State of Missouri, and one of the defendants herein, by his counsel, in flagrant disregard and contempt of the jurisdiction of this court, filed in the Circuit Court of Kansas City, Missouri, his two petitions in equity in the name of the State at his relation as Attorney-General, against this complainant, one asking that the court by mandatory injunction require complainant to put in force the maximum freight rates provided by the said legislative acts of 1907 mentioned in the amended and supplemental bill, and to comply with said acts, and the other as asking the same relief as to the rates fixed by the passenger act of 1907. And at his solicitation, the

judge of said state court did, in each of said cases, the same day, without notice, issue its restraining order, returnable upon the 18th day of June, 1907, requiring the forthwith doing of such acts by this complainant.

Complainant asks leave to produce upon the hearing of this petition, certified copies of said proceedings in the State court, and refer to them as fully as if copied herein." (1-76.)

After reciting the proceedings herein of the 14th and 15th of June, and the order of court of June 17th, the amendment proceeded:

"18. Thereafter, upon June 18th, 1907, the Circuit Court of Jackson County, Missouri, upon the application of the said Attorney-General, entered an order dismissing the case mentioned in paragraph 15 hereof, which was filed against this complainant for a mandatory injunction to require it to put in force the maximum freight rates provided by the said legislative acts of 1907, and upon the same day the same court, upon the application of the said Attorney-General, entered an order setting aside the restraining order issued in the case mentioned in the same paragraph to require it to put in force the maximum passenger rates fixed by the legislative act of 1907 aforesaid, but did not dismiss the case, the Attorney-General insisting that it should remain pending. He now threatens to, and he will, unless enjoined herein, proceed with the trial and prosecution of the same on and after September 20, 1907, at the expiration of the ninety-day test mentioned in the order hereinbefore set out.

19. The said State court has no jurisdiction in the premises, and has no right or power to compel complainant by injunction to put in force the maximum passenger rates aforesaid, and any attempt so to do would deny complainant the protection accorded to it by the fourteenth amendment to the Constitution of the United States, which it now claims. Such attempt to oust this court of its jurisdiction, is in contempt thereof, and as to it was and is futile." (1-78.)

The rest of the amendment is taken up with matters relating to other cases and argumentative statements as to the effects of the acts of 1907. There is no charge that anything more is proposed by the defendants, or any of them, than the prosecution of the suit in equity instituted by the State on the relation of the Attorney-General in the Circuit Court of Kansas City, and the only specific relief asked is that "Herbert S. Hadley, Attorney-General of the State of Missouri, be temporarily and permanently enjoined from prosecuting the said suit in the State court which he has instituted against the complainant." (1-75 to 81.)

On August 2nd, 1907, the defendant demurred to the amended and supplemental bill as amended, assigning as grounds of demurrer that (1) there was no equity in the bill, (2) complainant had an adequate remedy at law, (3) the matters set forth were not germane to or supplementary of the original bill, (4) the new matters constituted, if anything, a new, original and independent cause of action, (5) the suit in the Circuit Court of Kansas City was rightfully instituted, and that court had jurisdiction of it, and (6) the complainant had an adequate remedy by defense in the State court to the suit brought by the State. (1-82 to 85.)

The demurrer was overruled on April 10th, 1908, and on May 12th, 1908, answer was filed. In the answer the contention was renewed that complainant had an adequate remedy by defense to the State's suit, and that the amended and supplemental bill was not proper to be filed herein. (1-95 to 103.)

Replication was filed by complainant and testimony was taken in the case bearing upon the issues made by the amended and supplemental bill. There was no evidence offered to show any purpose by anybody to institute or

prosecute any suit or suits against complainant under the acts of 1907, save the averments in the answer that the Attorney-General intended to prosecute the equity suit in the State court brought by him on behalf of and in the name of the State to enjoin the complainant to comply with the act prescribing a maximum of passenger rates.

Meanwhile the term of Herbert S. Hadley as Attorney-General expired, and Elliott W. Major, having been elected to succeed him, was substituted in his place as a defendant.

The court, by its final decree rendered April 17th, 1909, found the freight laws of Missouri of 1905 and 1907, and the passenger rate law of the latter year to be unreasonable and confiscatory and enjoined the "defendants, Elliott W. Major, Attorney-General of the State of Missouri, John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad Commissioners of the State of Missouri, and each of them, their agents, employes and successors, * * * * * * * from enforcing or attempting, directly or indirectly, by suit or in any other manner whatsoever * * * * * * * against complainant, its officers, agents, employes or servants, any of the provisions of, or penalties provided for" in the freight act of 1905 and the freight and passenger act of 1907. (5-5241-43.)

Briefly stated, the facts relative to the amended and supplemental bill are these:

The commodity act of 1907 prescribed a higher maximum than the act of 1905. The passenger act was entirely new legislation. The remedies provided by the laws of 1907 were different from those provided by the laws of 1905, and the case, as complainant conceived, called for new and additional parties, namely, the county judges and county treasurers and Messrs. Pike and Van Natta, prospective passengers, who were in nowise concerned with the legislation of 1905.

Before the supplemental bill was filed, but after motion for leave was made and notice of the motion was served, the Attorney-General filed in the State court the suits in equity for a mandatory injunction against the complainant to require it to observe in the one case the freight laws, and in the other, the passenger law, of 1907. Every objection made to those laws in this case, could have been made in those suits, and would have been heard upon its merits. It is not shown that any other proceeding of any kind was contemplated.

We submit that neither the acts of 1907 nor anything done or intended to be done under them afforded any basis for an amended or supplemental bill. If a cause of action was created by these acts, or any of them, or by anything done under any of them, it was a new, substantive and independent cause of action, and must be prosecuted as such, and the State court having first acquired jurisdiction of the subject-matter through the suits brought by the Attorney-General, the United States Circuit Court was without jurisdiction to entertain the amended or supplemental bill.

The 57th Rule of Practice in Equity provides:

> "Whenever any suit in equity shall become defective from any event happening after the filing of a bill (as, for example, by change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day upon proper cause shown and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead or answer thereto on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court."

A supplemental bill is in continuation of the same suit. It deals with the same rights, albeit in some changed phase. The essential cause of action remains the same. If none existed originally, none can be brought in by supplemental bill. If one did exist, a new and distinct cause cannot be added.

In William vs. Winans, 20 N. J. Eq. 392, it was sought to set aside a mortgage as in fraud of the complainant's rights and to compel the execution of a mortgage to him. Pending the suit the land was sold under execution issued upon a judgment against one of the defendants. This execution sale extinguished the rights of all the original defendants to the land. It was alleged, however, in a supplemental bill, that the purchase at the execution sale was made by the original defendants in the name of one David Cutter, the purchase price being paid by the original defendants, and that Cutter insisted upon holding the land and refused to mortgage or convey to complainant. The chancellor said:

> "Upon the facts stated in the supplemental bill the complainant cannot have any relief against the defendants in the original bill, on the grounds of relief there set forth. That is based upon a fraudulent transfer, by one of them to the others, of the land to be mortgaged, for the purpose of defeating the complainant's rights. By the sheriff's sale, which is set forth in the supplemental bill, the rights of all the defendants in the original bill are ended. By a sale under judgments not impeached, which were prior liens on the tract, the legal title was vested in Cutter. This title they cannot dispute, and all question as to the validity of their claims as against the complainant, is at an end. If they have any right to claim the interest in the premises by Cutter being a trustee, it arises under the sheriff's sale, and not under the transaction set out in the original bill.
>
> Had the defendants in the original bill, other than John T. Winans, bought in this title in their

> own names at the sheriff's sale fraudulently, as is set forth in this supplemental bill, this could not have been set up in a supplemental bill. It is a different transaction—no answer to the original bill; no evidence taken in that suit could apply to it. One transaction may be honest, and the other fraudulent; they are in no wise connected.
>
> But here is a new defendant, not concerned in the original frauds, who, by a new fraud, perpetrated by means entirely different, is brought into court to have this new transaction declared void. It can only be effected by an original bill. It is not even the proper subject of an original bill, in the nature of a supplemental bill. Story's Eq. Pl., § 346."

So, in Milner vs. Milner, 2nd Edwards Ch. 114, a supplemental bill was refused in which was set up a new cause of action giving right however if established to the same relief prayed by the original bill. The Chancellor said:

> "The question in my mind is, whether the complainant upon her intending to rely upon the new facts must not file an entirely new bill. I consider it not a case for amendment or a supplemental bill. The latter is generally filed to continue the original suit, or is, in its matter, directly connected with it, and because of the original bill being somewhat defective. But here, there is new substantive cause of action upon which a decree can be had without connecting it with the original bill. The complainant is here wanting to go entirely upon new ground. In fact, to make a new case. If this is to be done, it must be by a dismissal of the present bill and the filing of a new one."

In Straughan vs. Hallwood, 30 W. Va. 274 l. c. 291, the court said:

> "When a supplemental bill is based on facts occurring since the institution of the suit, and seeks relief only against the original defendant, no new parties being introduced, it is in the nature of an amendment of the original bill, and must be

read with it, and the two must be regarded as one bill; just as when an amended bill is filed, merely correcting statements in an original bill, the two are regarded as constituting one bill. * * * * * * * It would seem to follow that if, on the original bill when all imperfections in it are disregarded, and the evidence in the cause, the plaintiff has no cause of action at the time of filing his original bill, he cannot maintain his suit by filing a supplemental bill setting up a cause of action that had accrued after the original bill was filed, even though it arose out of the same cause of action that was the subject of the original bill. *A new cause of action should not thus be permitted to be presented by a supplemental bill; for such supplemental bill being a part and an addition to the original bill, and to be read with it, to permit this would be to violate the obvious principle that in every case the cause of action must exist at the time the suit is brought.*"

And in Heffron vs. Knickerbocker, 57 Ill. App. 339, l. c. 340, it was said explicitly:

> "On a supplemental bill no relief can be had upon a cause of action which did not exist when the original was filed."

And such was the effect of the ruling in Minnesota Co. vs. St. Paul Co., 6 Wall. 742. In this case the first supplemental bill set up a claim to certain rolling stock under the decree of foreclosure of mortgage rendered in the original suit. A second supplemental bill was filed setting up a claim for the use of the rolling stock during the period of litigation under the first supplemental bill. The court said:

> "It is quite apparent that the matters set forth in this bill are not the subject of a supplemental bill. The first supplemental bill set up a claim to the rolling stock under the decree in the original suit of foreclosure of the mortgage. The present bill is filled with matters of complaint, which have occurred since the original decree of foreclosure

> and sale, and which have no necessary connection with that decree, such as a claim for the use of the rolling stock, the right to which was in litigation in the first supplemental bill, and in respect to which no right could be set up for the use of it until the title had been determined in its favor, and as it respects the portion of the bill relating to the violation of the charter, an attempt to divert the travel and interrupt the through line in running the road, the matter could have no possible connection with the original bill or decree, of which this is claimed as supplemental. The decree below was, therefore, right in dismissing the bill."

In Reedy vs. Scott, 23 Wall, 352, the original bill was filed to enjoin the infringement of rights secured by letters patent. Pending the suit the patent was reissued and a supplemental bill was filed based on the reissue. The court held that infringement of the reissued patent because a new cause of action for which, in the absence of agreement or acquiescence, no remedy could be had except by a new suit.

Higginson vs. R. R. Co., 102 Fed. Rep. 197, decided by the Circuit Court of Appeals, is very like the present case. In the original suit the complainants had secured a decree which restrained the defendants from putting into force the scale of rates prescribed by an act of the Legislature of Nebraska, approved April 12, 1893, on the ground that the rates were unreasonably low and confiscatory. In 1900 the defendants made an order requiring the railroad companies to show cause why certain rates then in force should not be reduced. Their right to do this was challenged by complainant upon the ground that the defendants, who consituted the State Board of Transportation, had no power to prescribe rates. The matter was presented by supplemental bill, in the view, evidently, held by complainant in the case at bar, that the court having jurisdiction of a case in which the propriety of a certain schedule of rates was involved, any

[illegible] of the State's power to prescribe rates, could be brought for review into the original case by supplementary proceeding. The court said:

> "[illegible] we deem it proper to add that the [illegible] question which is presented by the [illegible] bill concerns the extent to which the [illegible] 1887, creating the State board of transportation, has been repealed, and the [illegible] of the board taken away by the subsequent [illegible] April 22th, 1893. The complainants [illegible] right to relief, so far as we are at present [illegible], upon the theory that the board of transportation is at present proceeding to exercise [illegible] upon it by the former act which [illegible], by implication only, by the later [illegible] this question was in nowise raised or [illegible] in the original case in which the supplemental bill has been filed, but is essentially a new [illegible] we have been led to entertain, and we do [illegible] whether a supplemental bill [illegible] that question can be lawfully entertained [illegible] with established rules of procedure [illegible]. It would seem to be more appropriate to litigate a new question of that nature by [illegible] bill, and this is an additional reason [illegible] as to approve of the action of the [illegible] in denying a temporary injunction. The order from which the appeal was taken is [illegible] affirmed."

[illegible] v. [illegible], 184 U. S. 99, may be taken as a type of the cases wherein an amended bill is allowed with respect to the subject matter of the litigation. Both bills were [illegible] transaction as well as upon the same general [illegible]. No new cause of action was introduced.

In the case of [illegible] there was no defect of any kind in the original [illegible] occurred after it was instituted to make [illegible] as to parties. The term of office as [illegible] of the defendant, Rice, had expired, and [illegible] had been elected to succeed him. It was proper,

therefore, to bring in Oglesby as a party in the place of Rice. But the repeal of the act of 1905 did not make the suit defective. On the contrary, it gave to complainant, so far as concerned the future, the relief for which it prayed. True, it was not the full measure of relief desired, since it did not relieve against penalties already incurred and did not provide for payment of costs, but on the other hand, it interposed no hindrance of any kind thereto. The case could proceed to decree after Oglesby had been substituted for Rice, and the complainant could secure upon the case originally made all the relief to which it was entitled.

The Legislature of 1907, however, enacted new legislation, prescribing a schedule of maximum freight rates different from and higher than that prescribed by the act of 1905, which was the basis of the original suit. It also, by separate enactment, prescribed a maximum of two cents per mile for passenger travel.

The act of 1905 provided that for exceeding the maximum prescribed by it, the company offending "shall forfeit and pay to any person thereby affected the freight rate charged, demanded or received in excess of the rates prescribed * * * together with all actual damages caused thereby, to be recovered in any court having jurisdiction thereof by the existing law. And if plaintiff in such action recover judgment therein the court shall treble the same and the plaintiff shall, on motion, be allowed a reasonable attorney's fee for bringing the action." Charles M. Daily, William F. Davis and James F. Robb, said in the bill to be shippers over the road were, because of this provision, made defendants to the original bill as representatives of a numerous class of shippers

The act of 1907, fixing a maximum schedule of freight rates, provided that, in case of exceeding the schedule, the offending company "shall be adjudged guilty of a misde-

meanor, and on conviction shall be punished by a fine of not to exceed five thousand dollars," to "be paid into the school fund in the county in which the case is prosecuted." Because of this provision, Joseph M. Patterson, Charles E. Moss and George Dodd, county judges of Jackson county, and Arthur C. Warner, treasurer of the county, said to be charged with the special duty of collecting and caring for the proceeds of fines inuring to the school fund, were made defendants as representatives of all such officials of the counties through which the complainant's road was operated.

The school fund was not a beneficiary under the act of 1905, and shippers were accorded no remedy by the terms of the act of 1907.

Violation of the passenger act of 1907 is made a misdemeanor, punishable by a fine of not less than one hundred nor more than five hundred dollars. Thomas F. Van Natta and Vinton Pike are said to be frequent travelers over complainant's road, who threaten to enforce the law, and they are made defendants as representatives of a numerous class of passengers who demand the enforcement of the law.

It was alleged in the original bill that it was the special duty of the Attorney-General and of the Railroad Commissioners to secure the enforcement of the railroad laws of the State, and it was alleged in the supplemental bill that these officials were charged with a special duty to enforce the new enactments of 1907, but this allegation of the supplemental bill is denied and certainly a reading of the new enactments does not disclose any special duty imposed upon anybody.

The shippers, defendants to the original bill, have and can have, save in common with all the people of the State, no interest in the matters brought forward by the supplemental bill, and the county judges and treasurers and the passengers made defendants to the supplemental bill have and can have no interest in the subject matter of the original bill, and be-

tween the shippers and these other defendants there is no relation of privity or succession.

The grievances alleged in the supplemental bill did not exist when the original bill was filed. If they are real, they were brought into being two years thereafter by distinct, independent acts of legislation. They are not related to the matters complained of originally, which can be fully redressed without reference to them.

The freight rates of 1907 are higher than those of 1905; the passenger rates of 1907 are not involved in the original suit; different public and private interests are affected by the acts of 1907 and different parties are conceived by the complainant itself to be necessary.

The complainant endeavors to establish a bond of union between the act of 1905 and the acts of 1907 through something in the nature of a conspiracy on the part of the Governor and Legislature of Missouri designed to prevent the complainant from realizing benefits to which it claims to have shown itself entitled in the original suit.

The Governor, it is said, in approving the act of 1905, expressed apprehensions that some of the rates were too low, and in 1907, recommended an increase of these rates that they might stand the test of the judicial crucible. The Legislature, it is said, concurred with the Governor, and so passed the freight act of 1907, but while conferring a benefit with one hand, they took it back with the other, by the act reducing passenger rates to two cents, so that "while defeating pending litigation, the public as a whole would not be the loser. The result was that at the same session, and as part and parcel of one transaction and substantially as one law, and to accomplish such purpose," the passenger law was enacted. It is further said that "*the passenger act was passed for the avowed purpose of reducing the State passenger rates * * * so as to offset and overcome a supposed increase of certain of the State freight rates under the act of* 1907, *and*

the attempt was made to frame each act so as to avoid the injunctive relief in this and in each action heretofore instituted by the other railroad companies operating lines in Missouri." (1-70.)

We submit that it is not competent for the complainant, either by allegation or evidence, to fix a sinister purpose of any kind upon the legislation of the State. It will be presumed, and conclusively, that the Legislature acted in good faith, and with the sole purpose in each case to fix just and reasonable rates for the transportation of freight and the carriage of passengers. Even though it were demonstrated that the rates in any or in all the acts had been fixed too low, the good faith of the Legislature would not be impeached any more than a court impeaches itself when it overrules one of its own previous opinions. It was definitely settled in Fletcher vs. Peck, 6 Cranch, 87, that the validity of a statute does not depend upon the motives of its framers and these are not examinable in a court of justice. There the charge was made that the motive was absolutely venal, that the passage of the act in question had been secured by direct bribery of the legislators. The court would go into no inquiry as to this saying:

> "This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law."

Every statute here involved was clothed with all the requisite forms of law and was one which the Legislature might constitutionally pass, subject only to the limitation that the rates prescribed be just and reasonable, and the only inquiry that may be permitted as to any of them is that concerning the justice and reasonableness of the rates. And if it should be determined that any of the acts of 1907 is invalid because not compensatory, the only presumption the Court may entertain is that the Legislature was mistaken; it may not presume a purpose of injustice.

The acts of 1907 stand then as acts passed in good faith to establish reasonable rates for passenger travel and freight transportation, and in this respect unimpeachable, and they stand further, although presumptively only, as reasonable regulations in point of fact.

They present, therefore, new issues and form the basis of a new suit, if of any. The court, in the original case, had no power to fix rates. It could only decree that the rates in question were or were not compensatory. It could not deal with the matter as a board of experts and itself fix a schedule by which the propriety of any subsequent action of the State might be tested.

> "The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, *or what under all circumstances would be fair and reasonable as between the carriers and the shippers;* they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation. * * * * * * * * * It is not the function of the courts to establish a schedule of rates. It is not, therefore, within our power to

> prepare a new schedule or rearrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the rate prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of quasi-legislation. If a law be adjudged invalid, the court may not in the decree attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It stops with simply passing its judgment on the validity of the act before it. The same rule obtains in a case like this."

Regan vs. F. L. & T. Co., 154 U. S. 362.

This limitation of the functions of the court limits the scope of the original suit to the rates there involved. The power of the court would not be annulled nor its jurisdiction defeated by any change in parties or in the remedies prescribed by law for making the rates effective, or by any act of the State in contravention of the decree. Having jurisdiction to inquire as to those rates and to give relief against them, it could pursue that inquiry to the end and make effective the relief granted, and any defect in the suit, although occasioned by acts occurring after it was instituted, could be supplemented by new parties or by new averments.

The power of the State over rates is not circumscribed in the same way and remains unimpaired by the decree. Legislation in contravention of the decree, it is to be presumed, will not be enacted, and if it were it would afford no protection to persons attempting to enforce it. But always it would be the duty of the State to establish rates that were fair as between the company and the public, and no decree of the court could have the effect to put it in bondage or wardship in this respect. In the Regan case the circuit court not only held the established rates to be invalid, but also enjoined the Commission from establishing any new tariff, but this court held that the decree must be re-

versed in so far as it restrained the commission from proceeding to establish reasonable rates and regulations. Referring to the Regan case in St. Louis and S. F. R. Co. vs. Gill, 156 U. S. 649, the court said:

> "The opinion of this court on appeal was that, while it was within the power of a court of equity in such case to decree that the rates so established by the commission were unreasonable and unjust and to restrain their enforcement, *it was not within its power to establish rates itself, or to restrain the Commission from again establishing rates.*"

The court could not then anticipate the action of the State and hold that any schedule higher than the one before it for consideration was invalid, and it must be therefore that any future action of the State fixing a different and a higher schedule or prescribing rates for another and distinct branch of service is not contained within the original suit as a part of the cause of action presented by it.

The question is not affected by the fact that the original suit had not proceeded to a decree. A supplemental bill, if proper, may be filed after decree as well as before. It is in order, if necessary to secure to a party the benefits of the decree. After a decree dismissing the original bill because the rates involved were sufficient and the enactment of a law thereafter prescribing a lower rate, a supplemental bill would not be in order, as it would present a case not existing when the original bill was filed, and because the decree upon the original bill could not fix a minimum of rates below which the State might not go. And so after a decree sustaining the original bill and holding the rates involved too low, and the enactment of a new law prescribing higher rates, a supplemental bill would not be in order as it would present a cause of action not existing when the original bill was filed, and because the decree upon the original bill could not fix a schedule of

rates different from that involved and binding upon the State as a minimum, below which it might not go.

And *a fortiori* a supplemental bill could not draw into the original suit, rates affecting an entirely different branch of the service, as here the passenger rates. The freight rates alone involved in the original suit, might be too low or they might be too high, but however this might be, it could not affect the question of the propriety of the passenger rates. These would stand upon their own footing. Nor could they be made dependent upon the subject-matter of the original suit by an allegation that the Legislature had reduced these rates in retaliation of the prospective action of the court holding the freight rates to be invalid.

The court being limited in its power to determine the fact simply, whether the rates before it were or were not compensatory, and the legislature, after that detetrmination was made and the rates held to be too low, still possessing the power unimpaired to prescribe fair and reasonable rates, any schedule of rates fixed by the legislature, not contravening the decree, as, for example, not re-establishing the rates invalidated by the decree or not establishing lower rates, could not be an impairment of the decree, for the decree had not assumed to settle anything more than that the rates in suit, and by necessary implication any lower rates, were confiscatory. The decree not being impaired in anywise, the complainant enjoying all the benefits of it, there would be nothing on which to base a supplemental bill.

If this be not so, if the contention of the complainant is well grounded, then any and every action of the State hereafter, respecting railway rates, is now, in advance of its happening within the jurisdiction of the circuit court and subject to review in the pending suit. The date of the happening, whether one year or ten, after the date of the decree, is immaterial, for the rights secured by the decree

may not be impaired or the decree rendered defective at any time.

The Attorney-General on the morning of the 14th of June, 1907, filed suits in equity on behalf of the State of Missouri in the State court at Kansas City against the present complainant as defendant to enjoin obedience, in the one case, to the freight rates of 1907, and in the other, to the passenger rates. Proper process was at once issued and served. Any and every objection to the validity of the enactment involved suggested in this case, could be presented in those cases. The Circuit Court of Kansas City was a court of general jurisdiction and was possessed of full equitable powers. It could deal with every Federal question involved as fully as could the Circuit Court of the United States.

This court held in Blythe vs. Hinckley, 173 U. S. 501, that state courts had concurrent jurisdiction with the Circuit Court of the United States to entertain cases involving Federal questions, because, as the Chief Justice said:

> "The Constitution, laws and treaties of the United States are as much a part of the laws of every state as its own local laws and Constitution."

The proceeding by the State in its own tribunal was as appropriate to every purpose of justice as the proceeding by the company in the Federal court, for it was of the very same nature, that is, an equitable proceeding. No inadequacy of remedy, therefore, existed as a ground of jurisdiction in the subsequent equitable proceeding by the company in the Federal court.

It is too well settled for argument that when a State and a Federal court have concurrent jurisdiction of a cause of action, the one first acquiring jurisdiction is entitled to hold it exclusively until the final termination of the suit.

The State proceeded by original bill in its own court and had service of process upon the company before the latter had done more in the Federal court than to move for leave to file a supplemental bill and to file not such a bill, but the mere form of one. This motion was not passed upon until June 17th, three days after commencement of suit by the State, and being then sustained, the court ordered further, what was not prayed for in the motion, that:

> "Upon such filing process shall issue so that if the court hereafter decides that the ends of justice require, and the rules of equity permit, the said bill may be treated as an amended, supplementary, ancillary, dependent or original bill." (1-61.)

This order was by the court related back to June 11th, but it is submitted that the jurisdiction of the State court could not be ousted by thus arbitrarily turning back the calendar. The intervening days had gone and the court had no power to recall them.

If the jurisdiction of the Federal court ever attached it was on the 11th day of June, when the motion for leave to file the supplemental bill was filed, or, rather, it inhered in the original suit and as a part of it. If a supplemental bill was proper it might with some propriety be held that the jurisdiction of the court was invoked by and attached upon the filing of the motion for leave to bring it in. If an original bill was necessary and the so-called amended and supplemental bill may be treated as one, it was not filed until June 17th, and it was then too late.

No proceeding by the State or by any of the defendants is shown to have been contemplated, save and except the prosecution of the suit in equity begun by the Attorney-General on behalf of the State, and enjoined upon a bill filed three days after as a supplemental bill, but endowed

upon its filing with the changing characteristics, chameleon like, of an amended, suplementary, ancillary, dependent or original bill.

Conflicts of jurisdiction between State and Federal courts are always to be avoided, and contests by parties as to such jurisdiction are to be regretted. But the rights of the parties are equal under the law, and the one has as much right to invoke the jurisdiction of the State court as the other has to invoke that of the Federal court. Where they are not agreed, he who is first in time with a proper proceeding is first in right. The jurisdiction of the State court was invoked by the State in an orderly original suit, wherein every right of both parties could be conserved. The jurisdiction of the Federal court was invoked only by a supplemental bill presenting a new case as merely a changed phase of the old one and supporting this presentation by an imputation of sinister motives to the Governor and General Assembly of the State, an imputation of a kind which no court should entertain, much less accept as the basis of judicial action.

PART III.

PASSENGER RATES.

THE PASSENGER LAW OF 1907.

By an act of the legislature, approved February 27th, 1907, all railroads in Missouri, except independent lines [illegible] miles in length were limited to a compensation not exceeding two cents per mile, "for the transportation of any person with ordinary baggage not exceeding one hundred pounds in weight," and "for the transportation of children of the age of twelve years or under one-half of the rate above prescribed." This act became effective June 14th, 1907. (Record, Vol. I, p. 69.) The rates prescribed by the act were actually put in force on June 20th, 1907, and continued in force until the decree [illegible] was entered on April 17th, 1909.

The law of Missouri previously in force on this subject prescribed as to all trunk lines of railroad a maximum of three cents per mile for the transportation of passengers, and one and a half cents for children of the age of twelve years or under, and as to branch lines and short [illegible] lines, four cents for full fare and two cents for children of twelve years and under.

OPINION OF THE COURT.

The court in its opinion holds it to be shown by the testimony:

That it costs more by twenty-five per cent to carry passengers locally than it does when interstate. (5-3297.)

That the increase of travel due to a decrease in the rate of fare has been less than three per cent and more nearly two per cent. (5-3300.)

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*References are to the volume and page of the printed record.

That by the abolition of passes and other forms of free transportation, the passenger revenue is increased less than one per cent. (5-5300.)

That the same trains carried both State and interstate passengers. (5-5302.)

That the company was entitled to a return of six per cent per annum upon a fair valuation of its property. (5-5302.)

The opinion concludes:

> "The passenger earnings under the two cent fare law of 1907, allowing nothing for extra cost over interstate business, give no return whatever to the Rock Island, St. Louis & Hannibal, Kansas City, Clinton & Springfield, and the Great Western. The other companies will have the following: The St. Louis & San Francisco between three and four per cent; the Santa Fe between four and five per cent; the Kansas City Southern, a small fraction over two per cent; the M., K. & T. between two and three per cent; *the Burlington between three and four per cent.* But all this is arrived at by allowing no extra cost for service. But to add the extra cost of freight and passenger, there are no earnings over expenses. This is confiscation under the Constitution.
>
> It being a legislative act, and not a judicial one, this court cannot fix rates. If it could, two and one-half cent passenger rates would be fixed for the stronger roads and three for the others. But that is for the legislature acting itself with experts, such as the State employed in these cases, or through a commission with like assistance." (5-5303.)

FINDING OF FACTS.

The court made a specific finding of facts, and therein holds that:

The same roadbed, locomotives, cars and trains, including all facilities, are used for both classes of business, State

and interstate. It is not practicable to conduct the business in any other way. This is so, both from the standpoint of the public and that of the companies. (5-5305.)

The expenses of doing business, State and interstate, should be apportioned, not on the basis of the passenger miles of each, but upon the basis of the revenue received in each. (5-5309.)

Upon this revenue basis the expense of doing State passenger business is greater than the expense of doing interstate passenger business by at least twenty-five per cent. (5-5310.)

> "After the adoption of the two-cent fare statute, there was no substantial increase in travel. For a few weeks there was a small increase largely brought about by interstate passengers buying tickets to state lines, and in part by the novelty. What, if any, increase of travel occurred by reason of said two-cent fare, would be a mere approximation. It has not been substantial, and there is no reason to believe that any such increase will be brought about in the future by a two-cent fare." (5-5310.)

The value of the company's property in the State, 1,136.34 miles, is $46,793.00 per mile, making a total of $53,172,907.83. (5-5311.)

If the company had been permitted for the year ending June 30th, 1908, to charge and receive the amount per passenger mile, which it did charge and receive prior thereto, it would have received for the year named in addition to what did receive on account of State passengers $394,878.77, and on account of interstate passengers $261,556.41, "interstate, however, not controlled by statute, but by changing conditions." (5-5313.)

The court makes tabulations of earnings, expenses and dividends in which

> "An account has been taken of all earnings, State and interstate, freight and passenger, and miscellaneous; the proportion which State and interstate freight and passenger, exclusive of miscellaneous, bear to all State and interstate, miscellaneous included, and that which they bear to all the earnings of the State; of miscellaneous freight and miscellaneous passenger earnings, undivided as between State and interstate, with the proportion they are of all earnings, freight and passenger; of all expenses divided as between all kinds of freight and passenger business, including miscellaneous, but not divided as between State and interstate; of the deductions to be made from all State freights not including miscellaneous of such proportion of expenses of all freight and passenger, respectively, as the freight and passenger earnings exclusive of miscellaneous bear to all earnings; of the deduction of the extra cost; of the diminution of freight earnings if the freight rate statute had been observed; of the value of that portion of the property assignable to the particular traffic. This value is found taking for each class of business of the entire value of the property in the State, such proportions as the earnings on that portion of the business bear to all the earnings in the State." (5-5314.)

The tables referred to, comprehending the nine companies whose cases were tried, are to be found in the printed record, volume 5, page 5315 to page 5326. We set them out here only in so far as they relate to the Chicago, Burlington & Quincy Railroad Company, viz.:

EARNINGS.

	Amount.	% of all freight.	% of all earnings.
Interstate freight.....	$6,454,699.87	78.75	52.40
State freight	1,580,529.64	19.28	12.83
Miscellaneous freight ...	161,597.41	1.97	1.31
		% of all pass'gr.	
Interstate passenger	1,777,788.27	43.15	14.43
State passenger	1,611,702.92	39.11	13.09
Miscellaneous passenger.	731,021.89	17.74	5.94

ALL FREIGHT AND PASSENGER EXPENSES, INCLUDING MISCELLANEOUS, LESS TAXES AND RENTALS, UNDIVIDED AS BETWEEN STATE AND INTERSTATE.

		Taxes and Rentals	Taxes and Rentals
Freight.	Passenger.	Freight.	Passenger.
$6,793,610.00	$3,527,311.81	$12,225.30	$6,152.53

PERCENTAGES OF EXPENSES TO EARNINGS, UNDIVIDED AS BETWEEN STATE AND INTERSTATE.

		Including taxes and rentals	
Freight.	Passenger.	Freight.	Passenger.
82.88	85.60	0.00	0.00

STATE EARNINGS, EXPENSES, VALUATION, RETURN ON VALUE AND INTEREST CHARGE.

Period, Twelve Months, ending June 30th, 1908.

State earnings and expenses.	Freight.	Passenger.
State earnings	1,580,529.64	1,611,702.92
State expenses	1,324,452.83	1,489,746.71
Leaving	256,075.81	121,956.21
Less taxes and rentals	2,487.99 Cr.	2,798.50 Cr.
Leaving	258,563.80	124,754.71
Extra cost of doing state business, freight 50%, passenger 25%	484,129.29	158,205.70
Leaving	225,565.49 (Red ink) (Deficit)	33,450.99 (Red ink) (Deficit)
Diminution in earning if the state rates in question had been charged	112,533.71	
Leaving	338,099.20 (Red ink) (Deficit)	33,450.99 (Red ink) (Deficit)
VALUATION.		
Assignable proportion of value for representative period, and 6% interest thereon	12.83% 409,325.04	13.09% 417,620.02
RETURN ON VALUE.		
(a) Actual return upon the assignable value found in subdivision above the amount shown in the first subdivision above is	Nothing	Nothing
(b) Same without allowance or extra cost	2.11%	1.79%
INTERSTATE CHARGE.		
Actual interest charge paid on assignable property	132,735.02	135,424.89

The items "taxes and rentals" in the above tables may be misleading. Taxes and rentals paid by the company are all included in the expenses. The taxes and rentals noted in the tables cover receipts and not expenses, rentals received in excess of those paid. The items are by the court properly added to revenues.

The net result of these findings by the court is, that apportioning expenses between State and interstate passenger business, on the basis of earnings, without allowing for any additional expense of doing State business over interstate, the return upon the value of the property involved is 1.79%. Assuming that the State business costs 25% more than the interstate, there is no return upon any value of the property.

THE STATE'S POSITION.

The State recognizes the right of the company to reasonable compensation for the service rendered by it, and, saving exceptional conditions, concedes that reasonable compensation includes a fair return upon the value of the property employed. But the service rendered must also be taken into account and the charge may not exceed the value of that service, no matter what the cost may be. This court, in Smyth vs. Ames, 169 U. S. 466, said:

> "It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public *or the fair value of the services rendered*, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations and declare a dividend to stockholders."

In the course of the same opinion the court said the public was entitled to demand "that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

And in Covington, etc., Turnpike Co. vs. Sanford, 164 U. S. 578 l. c. 596, the court said:

> "It cannot be said that a corporation operating a public highway is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use its property. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature has authority in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public. So that

> the right of the public to use the plaintiff's turnpike upon payment of such tolls as, in view of the nature and value of the service rendered by the company, are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable."

THE STATUTE IS PRESUMPTIVELY VALID.

The presumption is that the rate prescribed by the law is reasonable, and the burden of proof is upon the company to show the contrary. Minneapolis, etc., Ry. Co. vs. Commissioners, 186 U. S. 257. "An act of the legislature fixing rates, either for passengers or freight, is to be regarded as *prima facie* valid, and the onus rests upon the company to prove its assertion to the contrary." Ex parte Young, 209 U. S. 123 l. c. 165. The evidence bearing upon the question is all in the possession of the company, and the showing made by it must be clear that the operation of the law is to confiscate its property, before the courts will interfere and declare the law to be invalid.

In Knoxville vs. Knoxville Water Co., 212 U. S. 1 l. c. 18, the court said:

> "The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind. Regulation of public service corporations, which perform their duties under conditions of necessary monopoly, will occur with greater and greater frequency as time goes on. It is a delicate and dangerous function, and ought to be exercised with a keen sense of justice on the part of the regulating body, met by a frank disclosure on the part of the company to be regulated. The courts ought not to bear the whole burden of saving property from confiscation, though they will not be found wanting where the proof is clear. The legislatures and subordinate bodies, to whom

the legislative power has been delegated, ought to do their part. Our social system rests largely upon the sanctity of private property; and that state or community which seeks to invade it will soon discover the error in the disaster which follows. The slight gain to the consumer, which he would obtain from a reduction in the rates charged by public service corporations, is as nothing compared with his share in the ruin which would be brought about by denying to private property its just reward, thus unsettling values and destroying confidence. On the other hand, the companies to be regulated will find it to their lasting interest to furnish freely the information upon which a just regulation can be based."

And in Wilcox vs. Consolidated Gas Co., 212 U. S. 19, l. c. 42:

"Of course, there may be cases where the rate is so low, upon any reasonable basis of valuation, that there can be no just doubt as to its confiscatory nature; and, in that event, there should be no hesitation in so deciding and in enjoining its enforcement without waiting for the damage which must inevitably accompany the operation of the business under the objectionable rate. But, where the rate complained of shows, in any event, a very narrow line of division between possible confiscation and proper regulation, as based upon the value of the property found by the court below, and the division depends upon opinions as to value, which differ considerably among the witnesses, and also upon the results in the future operating under the rate objected to, so that the material fact of value is left in much doubt, a court of equity ought not to interfere by injunction before a fair trial has been made of continuing the business under that rate, and thus eliminating, as far as possible, the doubt arising from opinions as opposed to facts."

OBJECTIONS TO THE COURT'S FINDINGS AND DECREE.

We challenge the finding and conclusions of the circuit court upon the grounds, that:

1. THEY ARE NOT CONSISTENT WITH THE SHOWING OF EARNINGS AND EXPENSES UPON WHICH THEY ARE PREDICATED.

2. THEY ARE BASED UPON THE OPERATIONS OF THE YEAR ENDING JUNE 30TH, 1908, WHICH WAS A YEAR OF GREAT DEPRESSION IN BUSINESS.

3. THEY IGNORE THE FACT, SHOWN BY THE EVIDENCE ON BEHALF OF THE COMPANY THAT DESPITE THE PANIC AND DEPRESSION, THE EARNINGS FROM LOCAL PASSENGER BUSINESS WERE MATERIALLY INCREASED UNDER THE REDUCED RATES.

4. THEY ASSUME EARNINGS AND EXPENSES TO BE AS SET OUT IN THE STATEMENT, EXHIBIT 98, SUBMITTED BY AND ON BEHALF OF THE COMPANY.

5. THEY APPORTION EXPENSES BETWEEN STATE AND INTERSTATE BUSINESS UPON THE BASIS OF THE REVENUE RECEIVED FROM EACH INSTEAD OF MAKING SUCH APPORTIONMENT UPON THE BASIS OF THE SERVICE RENDERED.

6. THERE IS NO COMPETENT TESTIMONY TO SUSTAIN THE FINDING AS TO THE BURLINGTON COMPANY THAT "THE EXPENSE OF DOING THE STATE BUSINESS OVER INTERSTATE IS GREATER * * * BY AT LEAST TWENTY-FIVE PER CENT. FOR CARRYING PASSENGERS."

7. THEY DISREGARD THE QUALITY OF THE SERVICE RENDERED AND BURDEN STATE BUSINESS WTH EXPENSES INCURRED FOR THE ES-

PECIAL BENEFIT OF INTERSTATE BUSINESS AND WITH THE COST OF CONVENIENCES TO INTERSTATE TRAVEL WHICH RESULT ONLY IN INCONVENIENCE TO STATE TRAVEL, THUS CHARGING STATE PASSENGERS FOR DISSERVICE RATHER THAN FOR SERVICE AND MAKING THOSE PAY MOST WHO GET LEAST.

1.

THE FINDINGS OF THE COURT ARE NOT CONSISTENT WITH THE STATEMENT OF EARNINGS UPON EXPENSES UPON WHICH THEY ARE PREDICATED.

The evidence submitted by the Company as to its operations under the passenger law covered the fiscal year ending June 30, 1908. It is contained, practically all of it, in Exhibits 98 and 99, which are produced by the witness, C. L. Sturgis. (5-5090 to 5096.) These show:

EXHIBIT 98.

EARNINGS.

	Interstate.	State.	Total.
Freight			$8,927,630.81
Miscellaneous, undivided.....			
Passenger	$1,777,788.28	$1,611,702.92	3,389,491.19

EXPENSES (undivided as between State and Interstate.)

	65.24% Freight.	7.24% Miscellaneous.	25.52% Passenger.
Mainterance of Way and Structures.....	$2,064,125.43	$229,066.04	$870,704.04
Maintenance of Equipment	1,322,784.23	146,795.80	557,986.24
Traffic Expenses.....	190,565.37	21,147.97	80,385.64
Transportation Expenses	2,935,912.75	325,812.52	1,238,447.56
General Expenses.....	219,981.99	24,412.27	92,794.36
Taxes	154,757.76	17,174.23	65,281.02
Rentals	167,406.42 Cr.	18,577.90 Cr.	70,616.57 Cr.
Total	$6,720,721.11	$745,831.13	$2,834,982.29
Grand Total			$10,301,534.53

PERCENTAGES ASCERTAINED FROM ABOVE FIGURES.

Character.	Amount.	Per cent of all earnings.
Freight	$8,035,229.51	65.24
Miscellaneous	892,401.30	7.24

		Per cent. of Passenger earnings.	Per cent. of all earnings.
Interstate passenger	$1,777,788.27	52.45	14.43
State passenger	1,611,702.92	47.55	13.09
Total	$12,317,122.00	100	100

PASSENGER EXPENSES.

(Apportioned on revenue basis.)

Interstate .....52.45% of $2,834,982.29=$1,486,948.21
State .....47.55% of $2,834,982.29=$1,348,034.08

THE PROPERTY.

Total valuation of Property in State	$53,172,907.83
Percentage on revenue basis assignable to State passenger business 13.09%	6,960,333.63
Interest on this at 6%	417,620.02

PASSENGER STATEMENT.

	State.	Interstate.	Total.
Passengers carried	2,695,868	987,808	3,683,676
Carried one mile	82,266,410	96,872,744	179,139,154
Carried one mile per mile of road.	72,593	85,482	158,075
Average miles hauled per passenger	30.52	98.07	48.63
Average revenue per passenger mile	$0.0196	$0.0183	$0.0189

The remainder of Exhibit 98 is taken up with examples showing expenses on different percentage basis.

EXHIBIT 99.

STATE BUSINESS.

Year ending June 30th, 1907	Revenue per passenger mile	2.44 cts.
Year ending June 30th, 1908	Revenue per passenger mile	1.96 "
Loss per passenger mile		.48

INTERSTATE BUSINESS.

Year ending June 30th, 1907 Revenue per passenger mile.....	2.10 cts.
Year ending June 30th, 1908 Revenue per passenger mile.....	1.83 cts.
Loss per passenger mile.....	.27 cts.
Total actual loss on State passengers 82,266,410 miles at .48 cts. per mile.....	$394,676.77
Total actual loss on Interstate passengers 96,872,744 miles at .27 cts. per mile.....	261,556.41
Total actual loss on all passengers.....	$656,435.18

Exhibits 100 and 101 deal with the freight business (5-5096 et seq). They were also introduced by Mr. Sturgis.

In these various exhibits, expenses are apportioned to the various classes of business, freight and passenger, State and interstate, in the ratio of the earnings of each.

This distributes the expenses as follows:

State passenger	$1,348,034.08
Interstate passenger	1,486,948.21
State freight	1,321,965.90
Interstate freight	5,398,755.21
Miscellaneous	745,831.13
Total	$10,301,534.53

There is no warrant in the Exhibits for any other distribution of the expenses in the first instance. Upon the assumption that the State business is more expensive than the interstate, the apportionment must, of course, be changed according to the percentage of increased expense. Mr. Sturgis shows how this is to be done on pages 5093 to 5095, of volume 5 of the Record. The distribution, as made above must, however, be taken as the basis and the percentage of increase calculated upon the amounts stated.

Counsel for the Company made a request for a finding of facts. (1-152-153.) The Court adopted the conclusions suggested therein. In the tables presented by counsel, the

exhibits submitted by Mr. Sturgis are followed as to the totals of earnings and expenses, the apportionment of earnings between freight and passenger business, State and interstate, and the apportionment of expenses to the freight business and the division of these again between State and interstate. In the request for a finding of facts the amount of expense charged to State freight is $1,324,453.83. (1-183.) In Mr. Sturgis' Exhibit 100 it is $1,322,165.90. This is a misprint; it should be $1,321,965.90, as verifying Mr. Sturgis' calculation will show. (5-5097.) Counsel, on page 153, have first included in the expenses a credit item of $2,487.99. Deducting this from $1,324,453.83, and we have $1,321,965.84, which agrees with the figures of Mr. Sturgis, when corrected.

Having followed Mr. Sturgis implicitly in everything until they come to the passenger business, they abandon him and put the basic amount of the expenses of the State passenger business at $1,489,746.71. This is stated as the revenue proportion of the expenses and without allowance for any increased expense of doing the business. (1-153.)

There is no warrant whatever for this figure. When Mr. Sturgis apportioned expenses among the five classes of business, State and interstate, freight and passenger and miscellaneous, in the ratio of the revenue derived from each, the results of his method must in fairness be accepted or rejected *in toto*. If we apportion expenses to freight on the revenue basis, the amount left to be assigned to passenger traffic has already been determined on the same basis. When we further assume to apportion expenses on this revenue basis between State and interstate passenger business, we necessarily get for the State passenger expense, the figure given by Mr. Sturgis, viz., $1,348,034.08. Instead, counsel asks the court to find, and the court does find, a result of $1,489,746.71. By what method this result is reached, we do not know. There is nothing in counsel's request; there

is nothing in the Court's opinion or findings to explain; and it is flatly against the exhibits introduced by Mr. Sturgis on behalf of the Company.

Here, then, is a serious error and to the great detriment of the State. Deducting the rental item of $2,798.50, and the excess charged to this expense account is $138,914.13. Adding this to the net earnings, as found by the Court, and we have, instead of $124,754.71, this sum, plus $138,914.13, or $263,668.84, which is the amount given by Mr. Sturgis. (5-5092.) This is .0381 per cent. upon the value of the property charged by Mr. Sturgis and the Court to the account of State passenger traffic. This is in harmony with the statement of the Court in its opinion that "the passenger earnings under the two cent fare law of 1907, allowing nothing extra cost over interstate business, give * * * the Burlington between three and four per cent."

This suggests that the figure $1,489,746.71 was used through some mistake in calculation, but as it is the basis of the Court's specific finding of facts it was necessary to make the matter plain.

Counsel for the Company, in their request for finding of facts, and in this they are approved by the Court, put the percentage of expenses to earnings as being, freight, 82.88, and passenger, 85.60. (1-152.) That is not in accordance with the Sturgis Exhibits, and is not adopted by either counsel or the Court in determining the freight expenses. They charge these as Mr. Sturgis does, with the full percentage proportion, and doing this must charge the passenger with like proportion, and no more, as otherwise they will have an amount of expenses above the fact. But charging the passenger traffic with expenses at 85.60 per cent. of earnings, and we still do not get the $1,489,746.71, but only $1,611,-702.92, multiplied by .8560, which is $1,379,617.69, showing on this basis an error of $110,129.02 in the calculation.

Taking then the testimony submitted by the Company itself, the conclusions to be drawn from it are not those expressed in the finding of facts, but rather those stated in the opinion, and quoted above, that the passenger earnings under the two cent law, allowing nothing on the score of increased cost of doing State business, give a return to the company of between three and four per cent. on the value of the property involved.

II.

THE YEAR ENDING JUNE 30, 1908, IS NOT A FAIR TEST PERIOD, BECAUSE IT INCLUDES THE PANIC OF 1907, AND THE SUBSEQUENT MONTHS OF SEVERE BUSINESS DEPRESSION.

So far we have accepted the evidence submitted by the Company, the purpose being only to show that the specific findings of the Court were not supported by that evidence.

We have now to consider that evidence, and shall undertake to show that it is not sufficient to overcome the presumption in favor of the rates prescribed by the law.

Our first objection is that it is limited to a period which is not fairly representative of the Company's operations, a period during which the earnings of the Company were below normal and the proportion of expenses to earnings was therefore exceptionally high.

To determine properly whether the law is valid we must deal with average conditions. Under the same rates, the road might earn money during one year and lose money during another. It would not be just to the company to test the rates exclusively by the fat year, and it would not be just to the State to test them exclusively by the lean year.

Take, for example, the calendar year 1904, of which we have evidence in the record. The Missouri passenger earn-

ings that year, State and interstate, were $3,920,172.40, a little above thirty per cent. of the total earnings in the State. The expenses assignable to the passenger service on the revenue basis would be approximately thirty per cent. of $7,717,920.94, or $2,315,376.28, leaving net earnings, State and interstate, of $1,604,796.12. Assuming only two-fifths of this to be derived from State business, and we have $640,-318.44. This would admit of very material reduction and still leave a large margin of profit. And while the record does not expressly so state, we may assume that these large earnings, State and interstate, were made on less than a two cent rate, because this was the year of the World's Fair at St. Louis, and we know that low rates are fixed for all such occasions. Trying the question solely by the operations of that year, the conclusion would be obvious that rates could be reduced below two cents and still leave more than six per cent. return upon the property. But the company would be swift to suggest that the year 1904 was for Missouri business, highly exceptional, and did not, therefore, afford a fair test of the question.

The fiscal year ending June 30, 1908, was, in another way, just as exceptional as the calendar year 1904. It is shown by the evidence, and is indeed a matter of common knowledge of which the Court will take judicial notice, that a financial panic occurred in October, 1907, and that this was followed by a severe depression in business, from which there was not full recovery for more than a year. Of the precise extent to which the panic and subsequent depression affected any particular business, the Court cannot take judicial cognizance. Reagan vs. Farmers Loan and Trust Co., 154 U. S. 362. But the Court knows, as all men know, that panic and depression mean a lessening of the normal business activities.

Prior to October, 1907, railroad managers were troubled to know how to handle the traffic that was pressing upon

them from every quarter. A half billion of dollars was said to be necessary to supply the new rolling stock required. After October, 1907, rolling stock to as great an amount in value was standing idle in the yards and upon side tracks. The Burlington road traverses a territory which is far from being developed. Its business increases in volume and value with every year save as interrupted by occasional panics and depressions. The gross earnings of the system, as shown by the record were for the fiscal years ending June 30, 1904, $63,984,377.49; 1905, $65,162,858.02; 1906, $73,413,385.88; 1907, approximately, $79,490,000, and for 1908, approximately, $75,490,000. Mr. Eustis, Passenger Traffic Manager of the Company, and one of its witnesses, testifies as to the effect of the panic and depression upon his company. The railroad companies felt the depression "more in freight than in passengers. On our road for the fiscal year ending June 30, 1908, the decrease in freight was $4,000,000, I think; and on passenger business it was just about even; about $150,000 ahead; in a passenger business of $8,000,000 we would consider that about even." (4-4375.) The $8,000,000 is a misprint. The passenger earnings for the Burlington System were, fiscal year ending June 30, 1904, $14,213,919.72; 1905, $15,688,766.42; 1906, $16,211,665.44. The total earnings increased during the year 1907, and presumably the passenger earnings did also. As the passenger earnings of 1908 exceeded those of 1907, it is obvious that $8,000,000 as the passenger earning of 1908 is a misprint.

Freight revenue fell off four millions of dollars during the fiscal year 1908. Eight months of this year were months of the severest depression. The falling off in freight revenues was due to a loss in the volume of business. There is no suggestion of a reduction in freight rates. The Missouri law reducing such rates had indeed been enacted, but it had been enjoined and was never in force.

While there was this great decrease in the volume of freight traffic and a consequent decrease in freight earnings, there was a large increase in passenger travel and a slight increase in passenger earnings. There can be no doubt, however, that the same causes which affected the freight business also affected the passenger business, and that the result was not so serious, was due to the existence of a counteracting force, and this was the reduction in passenger rates which took place, not only in Missouri, but as well in other states traversed by the Burlington system.

That the tendency of reduced rates is to stimulate business has been recognized by this Court. In Chicago and G. T. R. Co. vs. Wellman, 143 U. S. 339 l. c. 343, this Court, inquired, and answered by the very form of the inquiry, "Must it be declared, as matter of law, that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experience suggest the probability—*that a reduction of rates will increase the amount of the business, and, therefore, the earnings.*" And this language was quoted with approval in St. Louis and S. F. R. Co. vs. Gill, 156 U. S. 649.

A fair test of reduced rates can be had only under normal conditions. We had those from July 1, 1907, until the panic came in October. But the Company does not give us figures for this period. We are informed, however, that the increase of travel was greatest at the beginning and that it was less during the months of depression. In Knoxville vs. Knoxville Water Co., 212 U. S. 1, l. c. 15, the Court, dealing with an ordinance reducing water rates, said:

> "The precise subject of inquiry was, what would be the effect of the ordinance in the future.
>
> *The operations of the preceding fiscal year, or any other past fiscal year, were valueless, if the year was abnormal, and were only of significance so far as they foretold the future.*"

There has not been a fair trial of the two cent rate, nor a fair showing of the trial which has been made. The Company should have submitted figures showing the result of operations before the panic and after, and also of the operations during the later months of the year 1908, when business conditions were somewhat improved. Unfavorable, however, as were the conditions of the test to which the rate was submitted, the result shows that no harm came of it to the Company.

III.

UNDER THE REDUCED RATES, STATE PASSENGER TRAVEL INCREASED THIRTY-SIX PER CENT. IN VOLUME AND TEN PER CENT. IN EARNINGS.

As to the effect of the reduced rates in stimulating travel, the Court said in its opinion:

> "When the statutes in question were enacted, it was believed by many that by reducing the fare, there would be much more travel. For a month or so this proved to be true. But with the novelty gone, the testimony shows that the increase has been less than three per cent and more nearly one per cent." (5-5299.)

The finding of facts on this subject was:

> "10. After the adoption of the two-cent fare statute, there was no substantial increase in travel. For a few weeks there was a small increase largely brought about by interstate passengers buying tickets to state lines, and in part by the novelty. What, if any, increase of travel occurred by reason of said two-cent fare, would be a mere approximation. It has not been substantial, and there is no reason to believe that any such increase will be brought about in the future by a two-cent fare." (5-5310.)

The finding is plainly that the increase in State travel was small, continued but a few weeks, and was due in part to the novelty of the reduced rate and in part to interstate passengers buying tickets to State lines; largely to the latter.

We concede the correctness of this finding so far as it relates to *increase in State travel due to interstate passengers buying tickets to state lines.*

Such increase would naturally be small. Interstate travel goes largely by night and in Pullman cars. Passengers were not likely, many of them, to pay for Pullman accommodations, and then deny themselves the benefit of them and sit up all night to save a dime or at most a dollar on their railroad fare. And they could only avail themselves of the State rates by buying tickets or paying fare to the state line and again at the state line buying another ticket or paying another fare, to the destination beyond, and this meant a disturbance of their slumber. And the saving in any case would be very small as the average interstate rate on the Burlington road was only 2.1 cents per mile. (5-5096.) This would mean a saving of one cent for ten miles, of ten cents for a hundred miles, and of one dollar for a thousand miles. Now the average interstate ride was but 98.07 miles, so that ten cents would be the average reward for the foresight, thrift and self-denial necessary to get the advantage of the State rate.

And many passengers would not be aware of the opportunity of saving that thus lay open before them.

Besides, the testimony is direct that this continued for but a short time and only until the companies readjusted their interstate rates to the reduced State rates, which, it is contended, all of them did very soon.

This apparent increase of State travel through state line payments by interstate travellers was necessarily of

small significance. It is not referred to by Mr. Sturgis at all, and was not mentioned by Mr. Eustis in either his direct or cross-examination. The matter is suggested to by him by counsel on re-examination, and then he says that "We know it largely swelled the State traffic in Missouri for two or three months, but just how much, I do not know." (4-4390.)

In his cross-examination, in answer to the question whether there was not after November 1st, 1907, a considerable depression of business, and some diminution of travel, he said: "In through travel there was some falling off, or a considerable falling off, in through traffic." (4-4375.)

Now, this was due to the panic and not to State line purchase of tickets by interstate passengers, for it was more than four months after the two-cent State rate had been put into effect.

A comparative statement of passenger operations by months for the fiscal years 1907 and 1908 would, no doubt, have given some definite information on this subject, but the company, which had that information, did not choose to present it.

In fact, the company presented nothing which would serve to illustrate the effect of the reduced rates.

Mr. Sturgis gives us only the passenger operations for the fiscal year 1908, as a whole, not by months or other periods. He gives us the number of passengers carried, the passenger miles, the average journey of passengers, the average revenue per mile and the total revenue, divided as between State and interstate. (5-5093.)

As to the fiscal year 1907, he gives us only the revenue per passenger mile, State and interstate.

From this meager information, nothing can be determined.

Mr. Eustis, on his direct examination, ventured nothing on this score. In fact, that was confined substantially to the conclusion of the witness, without showing what either State or interstate passenger travel did, in fact, cost, that the local travel cost "not less than 25 per cent. more, probably not as much as 75 per cent more, and likely fully 50 per cent. more in the State of Missouri" than the through travel. (4-4368.)

On cross-examination some matters were plucked out from which a statement of passenger operations of the fiscal year 1907 can be made up, not, however, for any particular period of the year.

He was asked to make a comparative statement of Missouri passenger earnings for the four months ending October 31st for the fiscal years 1907 and 1908. He promised to have it made (4-4375), but it was never done. As this was the period of the fiscal year 1908, prior to the panic, the showing would have been of some value.

Some facts he gives us which enable us to make comparison between the fiscal year 1907 and 1908 in their entirety.

1. The number of passengers carried in 1908 increased twenty per cent over the number carried in 1907 (4-4383.)

2. The passenger miles increased during the same year something more than thirty-three and a third per cent. (4-4384.)

3. The total revenue from passenger travel in Missouri, State and interstate for the fiscal year 1907 was $3,348,753.09. (4-4375.)

4. The revenue from State passenger travel alone in Missouri, for the fiscal year 1907 was $1,473,000. (4-4384.)

5. By subtracting the revenue from State passenger travel, $1,473,000, from the total passenger revenue, $3,348,753.09, we get the revenue from interstate travel in Missouri for the fiscal year 1907, viz.: $1,875,753.09.

6. As the rate for State travel for 1907 was 2.44 cents per mile, the number of passenger miles made during that year in State travel was $1,473,000, divided by .0244, which equals 60,368,852.

7. As the rate for interstate travel for 1907 was 2.10 cents per mile, the number of passenger miles made during that year in interstate travel was $1,857,753.09, divided by .021, which equals 89,321,576.

The number of passengers in State and interstate travel respectively for the year 1907 can be ascertained by dividing the number of passenger miles by the average length of journey.

We get, then, the following table:

	1907.	1908.	Increase for 1908.
Interstate passengers.....	910,793	987,808	77,015
State passengers.....	1,978,009	2,695,868	717,859
Total passenger miles.....	149,690,428	179,139,154	29,448,726
Interstate " "	89,321,576	96,872,744	7,551,168
State " "	60,368,852	82,266,410	21,897,558
Total passenger revenues....	$3,348,753.09	$3,389,491.19	$40,738.10
Interstate " "	$1,875,753.09	$1,777,788.27 (dec)	$96,964.82
State " "	$1,473,000.00	$1,611,702.92	$138,702.92

Here, then, is an increase in the volume of business for the fiscal year 1908, in every respect, State and interstate. There is a greater number of passengers in each class and a greater number of passenger miles.

The total revenue for the year shows an increase, and there is an increase in the State passenger revenue. The interstate shows a loss, the increase in the volume of travel not having been sufficient to compensate for the reduction in rate made by the company from 2.10 cents to 1.83 cents per mile.

We are concerned, however, with the State travel. Under the year of reduced rates, the number of passengers increased 717,859, or thirty-six per cent, the number of pas-

senger miles increased 21,897,558, or thirty-six per cent, and the revenue increased $138,702.92, or nine and four-tenths per cent.

An increase of thirty-six per cent in the number of passengers and passenger miles is not a small increase, and if it was confined to a few weeks it could not be the result of diversion from interstate travel, for it is obvious that there was not interstate travel enough, if it were all diverted, to make up the increase. Indeed, if this increase in State travel had been confined to the first four months of operation under the two-cent law, it would have more than doubled the previous State travel for that length of time.

There is no evidence to show how this thirty-six per cent of increase in State travel was distributed throughout the year, but that is the fault of the company. Its witness was asked to exhibit a comparative statement of operations for the first four months of the years 1907 and 1908, which would have given us the effect of the novelty, of the diversion from State travel and of normal good times. The statement for the remaining eight months would have covered the period of depression.

But so large a percentage of increase on the business of an entire year was not the result of a feeble, short-lived spirt, but was the effect of a cause operating throughout the year. The reduction of rates was not a novelty which became stale, and of which people wearied with little use. Its attraction was a constant one.

The diversion from interstate to State travel by purchase of tickets or payment of fares to and from State lines was responsive to a force demonstrably feeble and confessedly short-lived. Feeble because signifying less than ten cents on the average interstate ride, and short-lived because soon eliminated by a readjustment of interstate rates, they being again reduced below the State rates.

It is to be observed, also, that the number of interstate travellers and the mileage traveled by them increased during the year 1908, considered as a whole, eight and fourtenths per cent. Mr. Eustis says "the normal increase for five years before that had averaged in all of the states as a whole east of the Missouri river 7.4% and in Missouri considerably more than that." (4-4383.) Well, the Missouri increase being 8.4% is "considerably more than that," as to the interstate travel alone. If we include the State travel, the total shows an increase of twenty per cent, very much more than 7.4%.

There was no change in rates prior to June, 1907, save while the World's Fair was in progress during the year 1904. The attraction of the fair and the reduced rates to it greatly stimulated travel, as we have seen, and now again during the year ending June 30th, 1908, there was the exceptional increase of twenty per cent in the volume of travel. Two unusual elements come into the operations of this year. One was the reduction of rates and the other the hard times. The natural tendency of the one was to stimulate travel, and the natural tendency of the other was to check it. Notwithstanding the counteracting force, there was an increase of twenty per cent, and we are certainly within the bounds of probability when we say that but for the counteracting force the increase would have been somewhat greater.

The twenty per cent of increase was on the total of the Missouri travel, State and interstate. If this was due, as we contend, to reduced rates, then it must have been most marked where the reduction was greatest, and among people who have most need to count the cost of what they do.

The statute operated directly only upon State travel, but indirectly it affected, so it is contended, interstate

rates as well. The reduction made by the statute was from a maximum of three cents to a maximum of two cents. This was not, however, the measure of the actual reduction in either State or interstate rates

The actual rates received during the year ending June 30th, 1907, were 2.44 cents on State and 2.10 cents on interstate travel. During the year ending June 30th, 1908, they were 1.96 cents on State travel and 1.83 on interstate. The actual reduction was .48 cents on State and .27 cents on interstate. (5-5092.)

More people were involved in State travel than in interstate. The number of passengers in the first class was 2,695,868; in the second, 987,808. The effect of the reduction must then have been greatest in the State travel, because the reduction was greater and more people were affected.

Most of the people involved in State travel are constrained to count their dollars, and even their cents. Many, if not most of those involved in interstate travel, would be less affected by slight reductions of expense. Through or interstate travel comprehends a much larger proportion of people who ride in Pullman and parlor cars, and who can indulge their desire for travel whenever they choose. The depression, as it affected business generally, no doubt, affected through or interstate travel, and the very slight reduction in the rates for such travel would not go far to counteract the effects of the depression.

For three reasons, then, the increase should be greatest in State travel. Here was the greatest reduction in rate, here a larger number of people were concerned, and here the people concerned were most considerate of cost.

The actual result, as we have seen, is in accord with these probabilities.

There was, moreover, a considerable amount of State travel not affected by the reduction, the travel done upon

two-cent mileage books, and which, during the year ending June 30th, 1907, amounted for State business to $91,000. (4-4386.) Making due allowance for this, the gain to the company in revenue from reduced State rates is fully ten per cent.

The lesser rate of increase in the volume of interstate travel finds a very simple explanation. To much of it, that very important portion, which uses the high class trains with their luxurious equipment, a slightly lower rate of railroad fare is not a great inducement. And during the year 1908 there was less occasion for increased interstate travel.

Business did not require so much. There was a falling off in freight earnings of $4,000,000, and there must have been a falling off in the passenger travel which is undertaken in connection with business. Mr. Eustis is evidently of opinion that it was so. He says (4-4375):

> "Q. After the first of November, 1907, there was a considerable depression of business, and some diminution of travel, wasn't there?
>
> A. *In through travel there was some falling off, or a considerable falling off in through traffic.*

This falling off was not due to the transfer of the same travel from the interstate to the State class, for it occurred after the occasion for such transfer had passed, and it is related by Mr. Eustis himself to the panic.

So we have not a slight increase of State travel, not "less than three per cent, and more nearly one per cent," as is stated in the opinon, but thirty-six per cent, and not ceasing when the cheapness had lost its novelty, but as cheapness is a constant attraction to those who have but little money to spend at best, continuing throughout the entire time for which we are accorded any information.

No adequate or rational explanation for this increase of travel is suggested by the testimony, except the reduc-

tion of rates, and the only conclusion fairly permissible is that the increase of travel was a consequence of which the reduction in rates was the cause.

And it is not shown that the increase in the volume of business entailed any additional expense. There is no claim that additional trains or equipment were required to handle it. There is testimony by some of the companies as to increased cost of operation, but not as between 1907 and 1908. And it relates all to the general upward tendency of wages and cost of materials, the movement running through years. As to the year 1908, Mr. Sturgis testifies (5-4758):

> "Q. Now, Mr. Sturgis, I notice on page 4 of this printed annual report, that your operating expenses for the system were approximately $3,000,000 greater for the fiscal year 1907, than they were for the fiscal year, 1908; am I right about that?
>
> A. It is not quite a fair comparison with those two figures, as shown by these two notes, because the restaurant dining car expenses are all cut out under the new classification of operating expenses, but the total operating expenses were less, as shown by this report.
>
> Q. How much less, after making allowance for those things?
>
> A. I cannot tell, because the operating expenses of these are not shown. Those are now kept as separate accounts, and the net result carried into the account. They are what Mr. Adams of the Interstate Commerce Commission calls outside revenue.
>
> Q. Approximately how many dollars difference would that make?
>
> A. My estimate would be that the operating expenses, as shown under the fifth head, show a decrease of at least $2,000,000 on the system for the year ending June 30th, 1908, as compared with the year ending June 30th, 1907.
>
> Q. After making those allowances?
>
> A. Yes, sir."

The year called for economy, and it was exercised to the extent of at least $2,000,000, and certainly Missouri was not an exception to the system, or, if so, exceptional and not normal conditions prevailed in Missouri.

The result then of a reduction of State passenger rates in a year during which the stimulus of the reduction was counteracted in considerable measure, how much cannot be determined, by business depression, was to increase State travel in volume thirty-six per cent and to increase the net revenue from that travel by ten per cent.

IV.

THE SHOWING OF EXPENSES FOR THE STATE OF MISSOURI MADE BY THE COMPANY FOR THE YEAR ENDING JUNE 30TH, 1908, INDICATES EITHER AN ERRONEOUS APPORTIONMENT BETWEEN THE DIFFERENT STATES OR SUCH EXCEPTIONAL CONDITIONS IN MISSOURI, AS TO BE UTTERLY USELESS FOR THE PURPOSE OF THIS CASE.

The general railroad law of Missouri, section 1070, R. S. of 1899, requires every company to transmit to the Railroad Commissioners "a statement in detail of the affairs of such company or corporation as the same existed on the 30th day of June first preceding, and of the business operations of such company or corporation for the year ending June 30th, as aforesaid."

This statement must be made under oath, "and must be made out upon printed forms, furnished by the Railroad and Warehouse Commissioners, which printed forms shall contain all interrogatories necessary to obtain a full statement, in detail, of the organization, condition, business affairs and operations of such railroad company or corporation for the year ending June 30th, as aforesaid."

COMPANY HAS NO RECORDS OF STATE EARNINGS AND EXPENSES.

The Commissioners have prepared printed forms, *which call for information as to operations within the State*, but the company has never complied with the call.

The reports for the fiscal years 1904, 1905 and 1906 are in the record. (2-1321 et seq.) That for 1904, under head of "Earnings from Operation—State of Missouri," recites, "We have no record showing Missouri figures separate from those of other states;" and under head of "Operating Expenses—State of Missouri," the recital is, "We have no records showing Missouri figures separate from the rest of the roads." And so as to details of operation, train, ton and passenger mileage, and the earnings and expenses per train, ton and passenger mile, etc., the report is only, "We have no record showing Missouri figures separate from other states." The report for 1905 is made up in the same way, while the report for the year ending June 30th, 1906, is simply blank on these subjects, and does not even volunteer an explanation of the omission.

It follows, therefore, that any and all statements of operations, earnings and expenses for the State of Missouri, presented by the company in this case are not mere rescripts from the books, but involve estimates, approximations and apportionments made for this occasion, and should not be accepted unless their correctness is demonstrated.

The statement of earnings and expenses in Missouri for the year ending June 30th, 1908, made by the company for the purposes of this suit was introduced by the witness Sturgis (5-5090), and is in Exhibit 98 to his testimony. It is as follows:

EARNINGS.

	Interstate.	State.	Total.
Freight			$9,927,630.81
Miscellaneous, undivided			
Passenger	$1,777,788.28	$1,611,702.92	$3,389,491.19

EXPENSES (UNDIVIDED AS BETWEEN STATE AND INTERSTATE.)

	65.24% Freight.	7.24% Miscellaneous.	25.52% Passenger.
Maintenance of way and structures	$2,064,125.43	$229,066.04	$870,704.04
Maintenance of Equipment	1,322,784.23	146,795.80	557,986.24
Traffic Expense	190,565.37	21,147.97	80,385.64
Transportation Expenses	2,935,912.75	325,812.52	1,238,447.56
General Expenses	219,981.99	24,412.27	92,794.36
Taxes	154,757.76	17,174.23	65,281.02
Rentals (not including interest on bonds, sinking fund payment or dividends)	167,406.42	18,577.90	70,616.57
Total	$6,720,721.11	$745,831.13	$2,834,982.29
Grand Total			$10,301,534.53

This statement was introduced in evidence on December 29th, 1908, and the testimony in the case was closed on the following day. It was, therefore, impossible for the State to make any original investigation of the facts involved, or do more than cross-examine the witness respecting them. How this statement was made up, or by whom, does not appear. It is recited in the introduction to the exhibit that it shows "the actual receipts from State and interstate business *which is a matter of actual ascertainment*, divided between State and interstate only as to passengers, the expenses apportioned as between passengers, freight and miscellaneous; the more difficult matter, i. e., the apportionment of the expenses as between interstate and State business, is not provided for, as the court must determine in which way this should be done—whether upon the revenue or some other basis." Beyond this Mr. Sturgis, in his examination, can say only, "It is taken from

the books. It is the figure that represents the correct figure." (5-4751.) But it is difficult to see how he takes the earnings for the State of Missouri as distinguished from the rest of the system "from the books" when the company reports to the Railroad Commissioners that "We have no record showing Missouri figures separate from those of other states." How, under such circumstances, can the receipts from State and interstate business in Missouri be "a matter of actual ascertainment."

How did he get the total of the expense for the State of Missouri as distinguished from the rest of the system? This is a matter of the highest importance. The sum he assumes to be the Missouri expenses, he apportions between passenger, freight and miscellaneous business according to revenue, which is the usage of the company in its cost accounting. The important thing is the sum to be thus apportioned. The introduction to the exhibit does not state this to be a matter of actual ascertainment, nor could it be if the company truthfully reports to the State Commissioners that *"We have no records showing Missouri figures separate from the rest of the roads."* The apportionment of expenses between Missouri and the rest of the system was then made on some basis of estimate or conjecture which is not disclosed in the record.

Testing this statement of expenditures for Missouri as best we can by such relative matters as do appear in the record, we find it to be such, that it is either so grossly unfair or deals with conditions so abnormal as to be utterly worthless for purposes of judicial inquiry.

It is not consistent with the experience of other trunk lines in the State; it is not consistent with the previous experiences of the Burlington company, and it conflicts with every known fact pertaining to the question and with every inherent probability.

The operating expenses as stated are 83.66% of the earnings.

In the case of the other companies, the proportion of operating expenses to earnings was, the Frisco, 71%; the Santa Fe, 72%; the Kansas City & Texas, 74%; the Chicago, Milwaukee & St. Paul, 70%; the Chicago & Alton, 74%. (5-4751.)

Confronted with this disparity, Mr. Sturgis can only say that "It is taken from the books; it is the figure that represents the correct figure."

Conditions were more favorable for the Burlington than for any other company in the State.

It is the strongest company financially. It pays the interest on its bonds, eight per cent dividends on its shares and has a large surplus account. It is, therefore, never hampered by want of money. It can always take the stitch in time which saves nine.

The topographical conditions, too, are on the side of the Burlington company. It traverses the northern half of the State, a prairie country throughout. It is an old road well constructed, and always well maintained.

The road lies all in the region of densest population. It operates between the three largest cities in the State: St. Louis, Kansas City and St. Joseph. The volume of business here is greater than elsewhere.

All these factors make for a less proportion of operating expenses to gross earnings.

Why, then, should the Burlington make so poor a showing compared with the other roads? Mr. Sturgis answers, "We have not shut down or been obliged to shut down, quite as closely as some of the other roads in their expenses. I can imagine that if some of the other roads got it down to 70%, our expenses at 83% would not be very far out of line." (5-4752.)

But they did cut down expenses on the Burlington. The report for 1908 showed $3,000,000 less than for 1907. (5-4758.) Some of this was due to a change in accounting, but the actual decrease was at least $2,000,000, and so there is no explanation of this remarkable contrast with the other roads.

It was not always so. We are given Missouri figures for the calendar years 1904 and 1905. (1-237.) How they were obtained when they had "no record showing Missouri figures separate from those of other states," we do not know, but the company presented them, and they are:

	1904.	1905.
Gross earnings	$12,891,638.78	$12,584,607.64
Gross expenses	10,887,290.67	11,251,724.91

From these gross expenses, however, must be deducted for the year 1904, the item "Proportion of Rental $3,169,369.73, and for the year 1905 the same item $2,974,501.50.

The deductions are to be made because this item of rental was not an operating expense at all, but a return upon property. It seems that during the years 1904 and 1905 there existed a hocus-pocus arrangement of high finance by which the Chicago, Burlington and Quincy *Railroad* Company with its capital stock of more than $110,000,000 and its funded debt of more than $170,000,000 leased all of its properties to the Chicago, Burlington and Quincy *Railway* Company, under a lease for ninety-nine years, "the rental being payment by the lessee of all the taxes collected against the property and other fixed charges, together with interest upon all outstanding bonds of the lessor, and sinking fund requirements and dividends upon the capital stock of the lessor at the rate of seven per cent. annually." (2-1379.) The *Railway* or lessee company had a paid-up capital of $10-, 000 dollars. The purpose of the arrangement seems to have been to secure to the bondholders and shareholders of the

Railroad or lessor company their then rate of interest and dividends by the guaranty of this $10,000 company and to secure to the owners of the shares of the latter company whatever increase of profit would result in the future from the operation of the properties. Such certainly would have been its effect. The arrangement was abandoned during the course of this litigation, and the dividends to the shareholders of the *Railroad* Company increased to eight per cent.

The true statement of earnings and expenses then would be:

	1904.	1905.
Gross Earnings	$12,981,638.78	$12,584,607.64
Gross Expenses	7,717,920.94	8,277,233.41

This shows the expenses for the calendar year 1904 to be only sixty per cent. of the gross earnings, and for the year 1905 only sixty-five per cent. The sum of expenses for 1905 is shown to be greater than for the year 1904, although the gross earnings for the latter year were less than the former. The greater earnings of the year 1904 are accounted for by the World's Fair at St. Louis. The greater expenses of the year 1905 are due, as we will show, to mere bookkeeping, which can be made to work wonders, if not miracles.

Whether we take the years 1904 and 1905 separately or together, 60 per cent. for the one year and sixty-five per cent. for the other, or sixty-two and a half per cent. for both, it is apparent, that time was when the Burlington Company could make as fair a showing as any company in the State.

The increase from 60 or 65 per cent. to 83 2-3 per cent. in two years from materially below to very much above the average of other companies, calls for an explanation which has not been made.

HOW EXPENSE ACCOUNTS ARE MADE UP.

It is easy to inflate expenses for any period as a mere matter of accounting or bookkeeping.

For example, in 1905, the Burlington Company charged operating expenses with five hundred and fifty thousand dollars for the reconstruction of the bridge over the Missouri river at Kansas City. (5-4756.) Manifestly the cost of rebuilding a bridge should be distributed over a period approximately equal to the life of the bridge. But this bridge has not been rebuilt to this day. The old bridge is still in use. *Not one dollar of the five hundred and fifty thousand dollars charged on this account to operating expenses in* 1905 *was expended during that year, or had been expended, when the testimony in this case was closed.* (5-4757.) This item alone is almost equal to the alleged increase of expenses in 1905 over 1904. This large item might as well have been charged to one year as another, or just as well not charged at all. The only thing that could be justified in this connection would be a depreciation charge of a substantially equal amount for each year.

Why was this extraordinary charge made to 1905? Freight rates were reduced by the Legislature of Missouri in that year, and there was an interest, and interest is often an inducement, to charge that year more heavily than preceding ones with expenses.

How much of the amount charged as operating expenses for the fiscal year 1908 is of this sort? We do not know, but there is something very suggestive in the testimony, and we do know that the sum charged for 1908 is in gross and percentage very and exceptionally large.

The gross sum of expenses for Missouri for the calendar year 1905 was $8,277,223.41; for the year ending June 30, 1908, it is put at $10,301,534.53, an increase in amount, after

an intervening period of only eighteen months, of $2,024,311.12, or twenty-five per cent., and the latter year one of enforced economy in expenditure.

In the earlier years for which we are given figures, the expenses for Missouri are less in the percentage to earnings than for the average of the system, while for the later year, the percentage is higher.

We have definite reports for the entire system for the years ending June 30, 1904, 1905 and 1906. These show (2-1321 et seq):

	1904.	1905.	1906.
EARNINGS.	$63,984,377.49	$65,162,858.02	$73,413,385.88
OPERATING EXPENSES.	$41,353,874.51	$41,479,169.43	$50,655,161.43
TAXES.	$1,862,181.53	$1,840,627.35	$2,018,494.16

This shows that for the year 1904, operating expenses, including taxes, were 67 per cent. of the earnings, in 1905, 66 per cent., and in 1906, 71 per cent.

For the period for which we can make comparison, the calendar years 1904 and 1905, the advantage is distinctly with the State of Missouri in the matter of economy of operation, 60 to 65 per cent. of earnings consumed in expenses as against 66 to 71 per cent. for the system as a whole.

We have not the official report in full for the fiscal year 1908, but we are given some facts from which we can approximate earnings and expenses.

The gross earnings per mile of road are said by Mr. Sturgis to be $8,700. This, with 9,023 miles, would give us about $78,500,000. The net income, after paying operating expenses and taxes, he says, was $20,005,002. (5-4757.) This makes operating expenses $58,494,000, or approximately seventy-four per cent. for the system as a whole.

The operating expenses for Missouri being put at 83.63, the conditions previously existing are reversed and Missouri, instead of being below the average of the system in proportion of expenses to earnings, is about ten per cent. above.

If we go into details of Missouri expenses, we shall find the increase greatest where it is least to be expected. The comparison for the calendar year 1905, and the fiscal year 1908, is as follows:

	1905.	1908.	Per cent. of Increase.
General Expenses	$812,483.64	$885,888.49	9.
Conducting Transportation	3,862,015.99	4,500,172.83	16.
Taxes	198,415.86	237,213.01	20.
Maintenance of Equipment	1,653,440.56	2,027,566.27	24.
Maintenance of Way and Structures	1,750,867.36	3,163,895.51	81.

The report for the fiscal year 1906 shows that taxes were increasing outside of Missouri as well as within. And so with all the other items of expenditures.

For the fiscal year 1906, the cost of maintenance of equipment on the system was $1,606 per mile, for Missouri, during the calendar year 1905, the nearest period we have for comparison, it was $1,446. For the same periods the cost of maintenance of way and structures was, for the system, $1,222 per mile, and for Missouri, $1,448. In the Missouri statement for maintenance of way and structures, however, there is the extraordinary bridge charge, which, being deducted, would leave the Missouri expense on this account below the average of the system.

So far as we can determine, maintenance of equipment and maintenance of way and structures cost less per mile in Missouri prior to the fiscal year 1908, than the average of the system.

How was it in 1908? Mr. Sturgis (5-4751) gives us these figures:

	Maintenance of Equipment.	Maintenance of way and structures.
System	$1,400	$1,600
Missouri	1,800	2,800

The cost of maintaining equipment for the fiscal year 1908 decreased on the system two hundred dollars per mile over the fiscal year 1906, and increased in Missouri nearly four hundred dollars per mile over the calendar year 1905. And still, according to the company's statement, the total volume of business had during the periods involved increased on the system but not in Missouri.

Maintenance of way and structures on the system increased during the two years, from 1906 to 1908, from $1,222 per mile to $1,600, and in Missouri during the two and a half years, from the calendar year 1905 to the fiscal year 1908, from $1,448 per mile to $2,800. Thirty per cent. increase for the system and ninety-three per cent. for Missouri. And making proper deduction for extraordinary charges made in 1905, the increase is nearly two hundred per cent.

The attention of Mr. Sturgis was called to these exceptional figures, and he attempted to explain them, but he offers nothing to show why expenses should increase in Missouri so disproportionately to the rest of the system.

He mentions taxes, but these increased generally, and besides have nothing to do with maintenance costs.

The cost of labor and materials, he said, had increased, but this was not peculiar to Missouri (5-4749). The increase was general throughout the country. It cannot explain the decrease in cost of maintaining equipment over the system and the increase of such cost in Missouri. Neither does it account for an increase of nearly two hundred per cent. in cost of maintaining way and structures in Missouri, and an increase of only thirty per cent. on the system.

He says he has no extraordinary expenditures in mind to explain the Missouri increase (5-4752). He does not tell us how his statement for 1908 was made up or by whom, only that "It is taken from the books. It is the figure that rep-

resents the correct figure." And this notwithstanding the official reports of the Company, made presumably by him as General Auditor, state that "We have no records showing Missouri figures separate from other states."

The conclusion is unavoidable that the statement submitted for 1908 is something more than a mere rescript from the books. Apportionment of expenses to Missouri was necessarily made for the occasion, and there should be some showing that it was fairly made, and the more exceptional the figures the more emphatic the requirement for such showing. But here the statement was tossed into the case at the close without authenticity of any kind.

This record discloses that there is accounting and accounting. The expenses of any railroad, for any portion of the line and for any period of time, may be made to appear very much as desired.

We invite especial attention to the exhibit obtained from the office of the Company's General Auditor and found in the printed record (2-1274), under the head of "Arbitrary charges to replacement fund," for the years 1904 and 1905.

ARBITRARY REPLACEMENT CHARGES.

For the year 1904, the total charge for the system on this account is $678,112.62. This is made up of three general heads, viz.: Kansas City bridge, $100,000; equipment of various kinds, $187,000; roadway and structures, $391,-111.62. The bridge charge is entirely to Missouri, the equipment charge and the roadway and structure charge is on the basis of the road mileage in Missouri. This apportionment seems to be fair enough as to Missouri, and that for maintenance of way and structures recognizes that Missouri stands in this respect at least as well as the rest of the system. Whether this charge as a whole is a fair one on replacement account is another matter.

For the year 1905, the total charge for the system on this same account is $2,671,620.65. This is made up of two general heads, viz.: Kansas City bridge, $550,000; equipment, i. e. freight cars, locomotives and shop tools, $2,121,620.65. The bridge charge is entirely to Missouri, and the equipment charge on the basis of equipment mileage in Missouri.

That this is indeed an arbitrary charge is manifest. While the statement in its detail mentions the charges as for repairs, they are not for repairs in fact, but, as stated in the heading, "Arbitrary Charges to Replacement Fund." The repairs actually made during the year are otherwise accounted for and in detail. (2-1258 to 1261.) And we do not question the propriety of a replacement fund. It should, however, not be apportioned between the years to suit the exigencies of a law suit, nor increase in any particular state with the enactment of rate laws.

The freight law was enacted in 1905 and went into effect in June of that year. Replacement charges generally increased from $678,112.62 for 1904, the year of no law and no law suit, to $2,671,620.65 in 1905, when the law was enacted and the law suit begun, an increase in this item of charge, which is made to appear in expenses of operation, of three hundred and ninety-three per cent.

The charge to Missouri alone on this account increases from $180,474.00 in 1904, to $917,418.75 in 1905, more for Missouri in 1905 than for the system in 1904, and an increase for Missouri of more than five hundred per cent.

For locomotives the charge in 1904 is $70,000, and in 1905 it is $500,000. For Missouri it was $13,729 in 1904, and $91,500 in 1905, an increase of seven hundred per cent.

Passenger cars needed replacement to the extent of $30,000 in 1904 and nothing at all in 1905.

Freight cars replaced to the extent of $20,000 in 1904, needed replacement to the extent of $1,500,000.00 in 1905.

The Missouri increase was from $3,500 to $255,000, or in the ratio of one to seventy-two.

The Kansas City bridge depreciated $100,000 in 1904, and $550,000 in 1905, or in the ration of one to five and a half.

What is the result of it all? These marked disparities, each and all of them affected peculiarly the expenses of freight business and of Missouri business, and so had a marked bearing on the freight controversy in that State.

Laws may reduce earnings, and unjust laws may reduce them to the point of confiscation, but even bad laws do not wear out bridges, locomotives and freight cars, at least not at the rate indicated by this replacement account.

Conceding the propriety of a charge every year to the account of depreciation or replacement, beyond the actual repairs made in any year, such charge, if made, must be substantially uniform throughout the years. The actual repairs and replacements made one year with another will themselves include everything on these accounts, and the sole use of the arbitrary charge is to distribute extraordinary expenditures equally among the years. For example, if the Kansas City bridge was rebuilt in 1905, the charge for this should not all be made against that year. If each year is made to bear all of its burdens, no matter how exceptional they may be, then there is no warrant for an arbitrary replacement account.

The charge of five hundred and fifty thousand dollars for replacement of the Kansas City bridge is without warrant in the expense account of 1905. Deduct it from the cost of maintenance of way and structures, where it is included, and it leaves that cost at $1,200,867.36. There was no increase of mileage in Missouri from 1905 to 1908, and yet the company reports the cost of maintenance of way and structures for the fiscal year 1908, at $3,163,895.51. It is an

increase from $1,051 per mile in 1905 to $2,770 in 1908, while the increase for the system was only from $1,222 to $1,600. The statement is incredible if conditions were normal.

The equipment charge for the system was less per mile in 1908 than it was in 1906. At first blush this seems strange. We would expect this cost to be an increasing one, and so, in fact, it must be with increasing business. But in the calendar year 1905 there was the arbitrary charge for replacement $500,000 for locomotives, $1,500,000 for freight cars, and $121,620.65 for shop tools. This was all or most of it carried into the account of the fiscal year ending June 30th, 1906, for that year shows an increase over the preceding year in equipment account of nearly four million of dollars; that is, $13,938,972.81 as against $10,071,107.61. The charge having been made during the year ending June 30th, 1906, the equipment itself could be and was supplied, if it was supplied at all, during the year 1908 without charge to that year. This explains the decrease for the system. How much, if any portion of this charge has been expended, we are not informed. It may be all like the bridge charge. However this may be, it serves to lessen the apparent expense of this account for the year 1908. If new equipment was acquired from time to time, it was under this 1905 charge. But what is thus true of the system as a whole is equally true of Missouri. The enormous arbitrary charge to Missouri for replacement of equipment made in 1905 would keep down equipment expense account until the arbitrary charge was exhausted; but no, the statement of Mr. Sturgis charges Missouri with an increase of three hundred and fifty dollars per mile as against a decrease of two hundred dollars per mile on the system. This disparity of five hundred and fifty dollars per mile on this one account calls for explanation, but none is given.

How much of the expense account for the fiscal year 1908, upon the basis of which alone, the court is asked to

invalidate the passenger rate law, is made up of "Arbitrary charges to replacements funds?" What extraordinary expenses were incurred? How much were the expenses of the future anticipated and put into the account of 1908? We only know that arbitrary charges have been made in the past and in such manner as vitally to affect a controversy like this; that by the use of this "arbitrary" element the expenses for any year may be placed at a figure far from the truth, and that in this case the use of the "arbitrary" element has been distinctly detrimental to the State. The burden of the "arbitrary" has been imposed upon the lines in Missouri to the fullest possible extent, and beyond what is fair to the years in which it was entered up. The benefits of the "arbitrary," that is, the resulting reduction in the expense account of future years, has in some way been denied to the lines in Missouri, as conspicuously appears in the charge for maintenance of equipment.

The enormous charges for maintenance of way and structures, and for maintenance of equipment are not only unsupported by any testimony in the record, but are positively discredited by the facts to which we have called attention, and the same is true of the purported increase in general expenses of operation in 1908, over those in 1905, the changed relation in this respect of the Burlington to the other companies and of the lines in Missouri to the rest of the Burlington system.

If we assume for Missouri the same ratio of expenses to earnings shown for the system at large in 1908, the expense account for Missouri will be materially reduced. The earnings being $12,317,122, seventy-four per cent of this is $9,114,670.28, and of this in turn the State passenger proportion on the revenue basis, 13.09, is $1,193,110.39. This deducted from $1,611,702.92, the State passenger earnings leaves a net income of $418,592.59, or a little more than six

per cent upon $6,960,333.63, the value claimed for the property involved.

If we correct the excessive charge made for maintenance of equipment against the Missouri lines in 1908, if instead of charging them with an increase of $350 per mile over the years 1905-6, when the enormous arbitrary charge was made, we state the account as it stands for the system as a whole, that is, a decrease of $200 per mile, this will make a reduction of $550 a mile in Missouri, or a total of $628,094.50.

Maintenance of way and structures for 1905 was charged to Missouri at $1,533 a mile as against $1,222 for the system. Eliminating the arbitrary charge of $550,000 for the Kansas City bridge, and the Missouri charge is $1,051 per mile, much less than for the system as a whole. The system charge had increased to $1,600 a mile in 1908, or a little less than $400. There is no reason shown for believing that the Missouri expense increased in any greater sum; particularly true is this if we include in the 1905 account the arbitrary bridge charge, which itself amounts to $481 per mile. If we add to the larger charge of $1,533 a mile in 1905, the system increase of $400 for 1908, the Missouri cost of maintaining way and structures for 1908 would be $1,933 a mile, or a total of $2,207,080.07. The Sturgis statement charges $3,163, 895.51, an excess of $956,815.44. If we take what would be fair, the sum resulting after deducting the bridge charge as the basis for 1905 and add the increased system cost of 1908, we will have $1,051, plus $400 a mile, or a total charge for Missouri on this account of $1,656,747.29, showing an excess in the Sturgis statement of $1,507,148.22.

These excess charges for maintenance of equipment, and maintenance of way and structures should be deducted from the Sturgis account. His total expense account is $10,301,-534.53. Deduct the excess on equipment $628,094.50 and

the excess on way and structures stated at the least amount $956,815.44, and we have a total expense account of $8,716,-624.59. Dealing with the Sturgis statement as thus corrected, as he deals with it, we charge the State passenger traffic with 13.09 per cent, its revenue proportion of the expense, or $1,141,007.46. Deduct this from the gross earnings of State passenger business which are $1,611,702.92, and we have net earnings of $470,695.46. The value put by Sturgis and by the circuit court upon the property assignable to this business is $6,960,333.63, and the net earnings are 6.76 per cent on this amount. If we deduct the larger sum of $1,507,148.22 as excess from the Sturgis statement of expense of way and structures, the total expense account for 1908 will stand at $8,166,291.81. The portion of this chargeable to State passenger business is $1,068,967.59, and this deducted from $1,611,702.92, the gross earnings of the business leaves net earnings of $542,735.33, or seven and seven-tenths per cent upon the value of the property assigned to this business.

A correct expense account is absolutely essential here. And to be correct for the purposes of this inquiry it must not only be truthful, but must reflect normal conditions. The Sturgis statement is not such an one. On the contrary, it transforms the road, which at the first view we have of it in the record, was of all the roads in Missouri, the least expensive to operate, into the most expensive. It puts a portion of the Burlington system, the lines in Missouri, which, as we first saw them, stood well below the average of the system in the scale of expense, into a place far above the average of the system in that scale. Other evidence shows how this may be done, and how for the year 1905-6 it was done, by arbitrary charges for maintenance of way and structures and equipment aggregating for Missouri the sum of $917,418.75. We do not know that one dollar of this

charge was ever expended. We do know that most of it, $550,000.00, was not expended, but remains to this day a reserve fund in the treasury of the company. If loaded as Missouri was in the years 1905-1906 with an arbitrary charge for maintenance of way and structures of $550,000, the rest of the sytem not having any arbitrary charge at all on like account, its cost of maintaining way and structures increased in two years more than $1,200 per mile, while the expense of the system not thus inflated with arbitrary charges increased less than four hundred dollars, there may well be suspicion that arbitrary charges of great magnitude had become a fixed use and habit in the expense accounts of the Missouri lines. And this suspicion is confirmed when we find that an arbitrary charge in 1905 of $2,121,620.65 for replacement of equipment, with its mileage proportion, of which Missouri is duly debited, has the natural anticipated effect of reducing equipment charges on the system for the two years following, but as to Missouri, the unnatural and unexpected effect of still farther increasing those charges in the years immediately following. A statement exhibiting results so singular and harmonizing only with the exigencies of this suit, needs more support than the mere statement of the auditor that "is taken from the books. It is the figure that represents the correct figure," especially in view of the statement made by the same auditor that "We have no record showing Missouri figures separate from those of other states." Before the statutory enactments of a State are overthrown, we should have proofs more relevant than this.

V.

THE SO-CALLED REVENUE BASIS OF APPORTIONING EXPENSES BETWEEN STATE AND INTERSTATE BUSINESS WAS ADOPTED BY THE COURT, THAT IS, THE RATE PER PASSENGER MILE FOR STATE TRAVEL BEING HIGHER THAN FOR INTERSTATE TRAVEL, IT WAS ASSUMED THAT THE COST OF CONDUCTING THE BUSINESS WAS HIGHER, AT LEAST IN LIKE PROPORTION. THIS WAS WRONG, AS THE EVIDENCE SHOWS THAT THE RATES FOR STATE AND INTERSTATE TRAVEL WERE FIXED WITHOUT REGARD TO THE RELATIVE COST OF EACH KIND OF BUSINESS.

The average rate received for State travel is higher than the average rate received for interstate travel. Prior to the enactment of the two-cent maximum, it was 2.44 cents per mile in State business and 2.10 cents in interstate. After the enactment of the two-cent maximum, the rates, respectively, were 1.96 cents and 1.83. (Record, 5-5096.) In its accounting the company apportions expenses among its different kinds of business according to the revenue derived from each. The court adopts this as a basis upon which costs of service are to be determined.

This, we submit, is manifestly erroneous, unless the cost of doing business was first ascertained and the charge for doing it determined by that cost. Unless this was done, the revenue basis leads to the absurdity that the cost of service is increased by the mere fact of an increase in the charge therefor, and is decreased by a decrease of the charge.

There has been no attempt here to show that rates were fixed originally with reference to relative cost, and on the contrary, the evidence is all to the effect that a uniform mileage rate was imposed for all travel, State and interstate,

and that the lower existing rate for interstate travel is due entirely to competitive conditions.

Mr. Wm. Ellis, commerce counsel of the Chicago, Milwaukee & St. Paul Railway Company, testifies that his company does not and never did adjust charges to the expense per passenger mile of running its various trains, and that a uniform mileage rate had always been exacted except as competitive conditions reduced the rate on the longer journeys. (4-4236 and 7.)

Mr. P. S. Eustis, the passenger traffic manager of the Burlington company, testifies that the usage of his company, and, indeed, of all companies, was the same from the very beginning, and for the reason he says that wherever it has been regulated, the charge has been fixed upon the mileage basis by statute, "and where the individual had freedom to do as he pleased it were folly to adopt any other basis." (4-4371-4374.)

The rate for State and interstate travel being the same, the equality of rates meant, on the revenue basis, an equality of cost. Interstate rates were lowered from time to time by competitive conditions, cost not being taken into account, but the revenue basis of determining cost being adhered to, we are led to the conclusion that cost of interstate service has been correspondingly reduced. The sharper the competition, the greater the reduction and the lower the cost. This, too, although the same competition constrains the company to faster trains, to parlor, Pullman, buffet and observation cars, and generally to a superior and more expensive service than is rendered in its absence.

A reduction of rates required by law has no such effect. "Obviously," says Mr. Justice Brewer, in Ames vs. U. P. Ry. Co., 64 Fed. Rep. 165 l. c. 182, "the cost of transportation would be the same whether the companies received the prices which they did, in fact, receive, or the reduced rates

prescribed by house roll 33." Commenting on this in Southern Pacific Co. vs. Bartine, 170 Fed. Rep. 725 l. c. 757, Judge Farrington says: "This statement seems too clear to require demonstration or the support of authority; and it is equally clear that the cost of transportation would be the same whether the rates and the resulting gross income be increased or decreased. The mere fact that a man receives $20 rather than $10 for performing a service cannot increase his expenses."

The cost is incurred regardless of the return received for the service, and must, therefore, be independently ascertained. The expense cannot be inferred from the income, especially so, in the railroad business, where all the experts concur in saying that rates are not based on costs.

Indeed, the companies here do themselves reject the revenue basis, and their witnesses all unite in the contention that the State travel costs more than interstate, relatively to revenue, by various percentages. Each witness allowed himself a great latitude. Mr. W. B. Doddridge, general expert for all the companies, puts it at from 15 to 50 per cent. (4-3827.) Mr. Bethard, assistant general manager of the Missouri, Kansas & Texas, estimates it to be from forty to sixty-five or seventy per cent. Mr. Whitenton, general superintendent of the Rock Island in Arkansas, Louisiana & Oklahoma, thinks it is from twenty-five to fifty per cent. (4-4140.) Mr. Ellis is convinced that an estimate of fifty per cent extra cost for local business is very low, and thinks it exceeds that considerably. (4-4196.) Mr. McPherson, general manager of the Missouri Pacific, ranges from a minimum excess of 25 per cent to a maximum of 100. (4-4307.) Mr. Eustis, passenger traffic manager of the Burlington, "on the whole concludes that it costs us not less than 25 per cent more, probably not as much as 75 per cent more, and likely, fully 50 per cent more in the

State of Missouri, to handle local traffic than it does to handle through traffic." (4-4368.) Mr. Kendrick, vice-president of the Santa Fe company, taking everything into consideration, gives it as his judgment that the cost of State travel is from 50 to 100 per cent more than that of interstate. (4-4399.) Mr. Peabody, statistician of the Santa Fe, as becomes his calling, fixes the excess cost at precisely 48.49 per cent. (4-4418.) This is, however, only for his own road and for a particular period.

This testimony, if it proves anything, proves that the cost of State and interstate travel, respectively, is not in proportion to the revenue derived from each, and must, therefore, be independently ascertained.

VI.

THE COURT FOUND THAT "THE EXPENSE OF DOING THE STATE BUSINESS OVER INTERSTATE IS GREATER * * * * * BY AT LEAST TWENTY-FIVE PER CENT FOR CARRYING PASSENGERS." THIS FINDING, AS TO THE BURLINGTON COMPANY, IS NOT SUPPORTED BY ANY COMPETENT TESTIMONY.

The finding of the Court (5-5310) is without support except in the estimates of the company witnesses, the wide range of which shows them to be largely conjectural.

The only facts adduced are of a general nature, and in the main consist of matters of common knowledge. The significance of these facts, their bearing upon the question in controversy is not shown, as it might and should have been, by any records of the Company's experience.

The facts relied upon are:

The through train carries more cars than the local.

A large portion of the local travel is on branch lines.

The local train makes more stops than the through.

There is more switching of the local train.

There is more terminal service incident to local travel, per passenger mile.

The risk, and consequent expense, of injury to passengers is greater in local business than in through.

More baggage is carried on the local trains.

These are the matters upon which stress is laid by the Company's witnesses. Doddridge (4-3825 to 28.) Bethard (4-4078.) Whitenton, (4-4140 and 41.) Ellis (4-4229.) McPherson (4-4304 and 5.) Eustis (4-4367-71.)

It is to be borne in mind that in this case we have to deal with travel as State and interstate. The company does not so deal with it. It deals with it as local and through. A train which crosses the State lines, as those running on the Carrollton and Villica branches, is a local train, while those which run between St. Louis and Kansas City, entirely within the State of Missouri, are through trains.

There is more long distance travel on through trains than on local trains. A larger proportion of interstate than of State travel is long distance. The real contention of the companies is that the long distance travel is handled more cheaply per mile than the short distance travel, and as more of this is found in interstate than in State travel, the former, upon the whole, costs the company less per mile than the latter, or rather that the expense per passenger mile is less on through trains than on local trains.

The testimony shows that there are no trains operated exclusively for State or for intersate passengers by the Burlington Company, or by any other company in Missouri. Every train on every road carries passengers, State and interstate, between any two points, near or remote at which the train stops.

If then there is any greater expense incident to the operation of local trains, it is by no means all of it chargeable to

State travel. How much of the travel on the Burlington through trains is State travel and how much of that on local trains is interstate, we have no evidence to show. The only attempt in that direction is a loose approximation. Mr. Eustis says (4-4369):

> "I have not committed to memory, or got with me, figures that will show any one place. But I have gone over a whole lot of things for the purpose of arriving at a conclusion, and I find that on more than 3,000,000 dollars passenger earnings in the State of Missouri in the last year, 48% only was earned on local traffic—that is, traffic having origin and destination in the State, and that 73% of all the passengers we handled were local. That is, 73% of all the passengers we handled were local, with the usual local short haul, giving us about 46% of the total passenger miles, and, as local business is at a higher rate as a rule, 48% of the earnings.
>
> With the further idea to separate the two kinds of business, I classified our trains. It was quite a difficult job, but I concluded that 62% of all the passenger train miles were trains that carried practically nothing but local traffic. So with 62% of the train miles, 73% of the passengers carried gave us only 48% of the revenue. From that I conclude that the cost of earning 48% of the revenue was more than 48% of the total expenses, a good deal more."

The evidence shows at least four branch lines of the Burlington which are interstate roads, although in the railroad parlance the business done on them is local. Now Mr. Eustis tells us something of how much there is of this local business, but he does not tell us how much is State and how much interstate.

And when we consider the various other elements which are said to enhance the cost of local traffic, we have still less of detail and of definite information.

That the through train carries more cars than the local we may accept as true in a great majority of cases. But very much of the State travel is on these very through trains. How much of it? There is no evidence on the subject whatever.

On the other hand, the cars on the local trains have a greater seating capacity than those on the through trains. The ordinary day coach will seat twice as many passengers as the Pullman or the parlor car. Two cars on the local train may carry as many passengers as four cars on the through train. If they do this, the cost per passenger mile is less on the local train than on the through. What is the fact respecting this? We have no information as to the Burlington company. The various company experts of whom we inquired also had no information to give. Mr. Press, the statistician of the Frisco, said that his company has nothing to show "the average number of people carried by ordinary or day coaches, as compared with the average number carried by the Pullmans and special coaches of that kind. (4-4644.) Mr. Peabody has not the information as to the Santa Fe. (5-4662.) Mr. Nay is unable to say as to the Rock Island. (5-4692.) Mr. Doddridge, speaking from observation, thinks that more passengers ride in the local coach than in the through. (4-3925.) And this is all we have on the subject.

Mr. Ellis gives figures on this subject relative to the operations of the Chicago, Milwaukee and St. Paul in Wisconsin during a portion of the year 1906, showing that the information might have been gotten for the Burlington in Missouri during the year 1908. He also gave statistics as to the State and interstate passengers on two or three runs of through Milwaukee trains in Missouri. But the situation of the Milwaukee road is very different from that of the Burlington. There are no large cities on the Milwaukee in Missouri and no great through trains operating wholly within the State.

So as the record stands we have no proof, but simply presumption against presumption. More cars per train in through travel than in local, hence we may have more passengers. But more capacity in the local car than in the through, and so we may have more passengers here.

Now as to the branch lines. The record shows that as to the Burlington Company these are interstate roads. How much of the travel on them is wholly within Missouri is not shown.

Most of that on the Carrollton branch may be so as stated by Mr. Eustis. But that cannot greatly affect the question. The total passenger earnings of that line for 1908, State and interstate, were less than fifty-three thousand dollars, which is less than four per cent. of the State passenger earnings for the same year. And Mr. Eustis is frank enough to state that the Company has no other branch "which touches the State of Missouri as poor as this. This is an extreme case." But only the extreme case is presented for the information of the Court.

That the local train makes more stops than the through is admitted, and as well that it does more switching. Frequent stopping and starting entails expense, and so does switching. But this, we shall insist, when we come to consider the quality of the service as affecting the rate, does not justify a higher rate for local travel.

It is insisted that there is more terminal service per passenger mile required for the local travel. Mr. Doddridge puts this expense at five cents per passenger. (4-3826.) He bases this on figures not made by himself, and for whose correctness he cannot vouch. (4-3894.) And nobody else does. As against this, however, is the fact that the expensive terminals are in the large cities, and the further consideration that all terminals, alike in city and county, exist as much for interstate as for State travel. And the uptown offices in

the large cities, the offices in distant states not touched by the line of the railroad, the travelling passenger agents, the immense amount of advertising, are all used exclusively to attract competitive business. But Mr. Doddridge thinks State travel should be charged with this in like proportion as it is charged with other expenses, because the State is advertised through these agencies. (4-3878.)

The expense on account of personal injury is greater in the case of the local traveller, even where he is riding on a through train. Mr. Ellis gives an illustration of this in connection with a through train between Milwaukee and Lacrosse.

> "My question was, what additional expense is imposed upon train No. 1 by a passenger who gets upon that train at Milwaukee while it is waiting, ready to start, and who gets off that train at Oconomowoc after the train stops there according to its schedule?
>
> A. Now, let me ask you, Mr. Lehmann, do you mean what actual expense among those items we have apportioned exactly to the train?
>
> Q. Of any kind whatsoever?
>
> A. Well, the local passenger is one of the largest elements of risk to handle, and the local passenger on that train is a good deal more of an element of risk than the local passenger on the day train. *That train is made up with coaches at the rear, where, at a number of stations it stops, the platform may not reach back to them, unless it is an exceptionally long platform, and we have incurred out of the local traffic, before they get through, an element of risk that we have not with the through passenger who stays on the train.*" (Vol. 4, p. 4229.)

The train referred to is a night train, and undoubtdly if the man for Oconomowoc is debarked at a distance from the platform and must grope his way through the dark and along the side of the track, he may stumble and fall and hurt himself, which Mr. Ellis gravely observes would not

happen if he remained on the train. And so he should pay more per mile of travel for the extra hazard imposed upon him.

Mr. Ellis might have found a much better example for his purpose. The local passengers on through trains usually ride in day coaches, and when an accident occurs, a collision, it may be, and no matter whether head end or rear, the heavy Pullman coaches crash through the frail fabric of the day coaches, and the great loss of life and the great number of serious injuries is found to be in the day cars, the passengers in the Pullman often escaping with slight wounds or bruises and a severe shaking up. And this element of greater risk is to be charged into the mileage of those who must incur it and not the mileage of those who escape it, making passengers pay not for the protection which is afforded them, but for the peril to which they are exposed.

We had supposed that, as a rule, the longer the journey the more the baggage required. Mr. Ellis says, however, "the load of baggage is very much greater in the local than it is in the through travel." He explains (4-4222):

"Q. Don't the great bulk of passengers travelling locally travel with a mere handbag?

A. If you will go into any baggage car—

Q. I would like to have that question answered.

A. That is true.

Q. Now you may proceed.

A. Yes, because very few people carry baggage anywhere. But if you go into a baggage car at any time and check up the baggage piece by piece, you will probably find eight pieces in the local as compared with one in the through.

Q. Due to the travelling man as he is called?

A. Yes, sir.

Q. And he travels on a two-cent rate?

A. Yes, sir.

Q. Doesn't he in Wisconsin?

A. Yes.

Q. And your three-cent passenger is the one who carries the least baggage as a rule, isn't he? *The fellow that pays you the most gets the least?*

A. *Yes sir.* Now, when you have got through with all that the total baggage expense doesn't amount to much. (4-4222.)

We are concerned here with rates fixed at two cents by legislative enactment and not with two-cent rates voluntarily granted by the Company. It is hardly equitable to charge against the rates made by the law the cost of special service rendered to travel on low rates made by the company.

It would seem that the heavier, luxurious equipment and the added facilities of Pullman, parlor, buffet, dining and observation cars afforded the through travel would involve an expense as great as that entailed by some of the elements of inconvenience and discomfort of local travel noted by the company witnesses. But we are assured to the contrary. Mr. Ellis says (4-4215-16):

"Q. Aren't they (parlor cars) operated on practically any road running between any two large points?

A. I think so.

Q. They all have parlor cars?

A. I think practically all, yes.

Q. And they are the special inducement that is held out to the through interstate passenger, aren't they?

A. I don't know—well, yes, I think you can say they are.

Q. And they are the most expensive passengers you have to haul, aren't they?

A. Why, yes; a good deal more expensive.

Q. Than any other kind.

A. Yes, sir.

Q. And the same thing is true of the Pullman passenger, isn't it?

A. Yes.

Q. They are very much more expensive than any others?

A. Oh, yes; very much more expensive; but, Mr. Lehmann, if you would take all passengers that ride into the Pullman and parlor cars and put them into the general result, on a general average, *I do not believe the total effect of them all on the final result would be one millionth of a mill.*"

Upon this no other comment is necessary than that it is expert testimony.

Here is a statute of the State of Missouri, enacted upon a subject which is undoubtedly within the scope of the State's powers and valid unless clearly shown to prescribe rates so low as to be tantamount to a confiscation of the company's property.

Nothing specific is disclosed. Nothing beyond the opinions of interested witnesses that the cost of the service is somewhere from fifteen to a hundred per cent. more upon the basis of the revenue received than is the cost of some other service, which latter cost is not shown.

The evidence relating directly to the Burlington Company is that of Mr. Sturgis and Mr. Eustis. There is no other. That of Mr. Sturgis is confined to the receipts of the Company and its general expenses of operation. For the apportionment made of those expenses, upon the revenue basis, no reasons are assigned, and the other witness, Mr. Eustis, impeaches the propriety of that apportionment.

The testimony of Mr. Eustis is to be found in volume four of the printed record, from page 4367 to 4390. This, except as to rates and receipts, is in the most general terms. In the vital matter of expenses, there is nothing definite. He has "gone over a whole lot of things" which he has "not committed to memory," nor has he with him the figures. He has brought to the witness stand practically nothing but the conclusion "that the cost of earning 48 per cent. of the (passenger) revenue was more than 48 per cent. of the total (passenger) expenses, a good deal more."

This is not a sufficient showing to be made by the company which has possession of all the information bearing upon the question, whose witnesses need not indeed charge their memories with all the details, but who were bound to have with them the figures that would support their contention. The legal presumption in favor of the statute is of no worth if it must yield to the mere conclusion of a single interested witness.

VII.

COST TO THE COMPANY IS NOT ALONE TO BE TAKEN INTO ACCOUNT, AND THE SERVICE RENDERED IS TO BE CONSIDERED IN DETERMINING THE PROPRIETY OF THE RATE. THE THEORY ADOPTED BY THE CIRCUIT COURT DISREGARDS THE QUALITY OF THE SERVICE AND BURDENS STATE BUSINESS WITH EXPENSES INCURRED FOR THE BENEFIT OF INTERSTATE BUSINESS AND WITH THE COST OF CONVENIENCES TO INTERSTATE TRAVEL WHICH RESULT IN INCONVENIENCE TO STATE TRAVEL, THUS CHARGING STATE TRAVELERS FOR DISSERVICE RATHER THAN FOR SERVICE, AND MAKING THOSE PAY MOST WHO GET LEAST.

It is not contended that there should be any discrimination in favor of State travel, but it is insisted that there is no right to discriminate against it. If the company for its own convenience and profit chooses to establish through trains and relegate the State travel to local trains, it may perhaps do so, but if the expense of conducting the local business considered apart is thereby increased, it cannot properly be imposed upon the local business, because the increase was not incurred for the benefit of that business.

The State which chartered the railroad company, in virtue of whose authority it exercises the power of eminent domain and the function of a common carrier, has the right to require that the interests of its people shall be considered and fully and fairly served. This Court, in Lake Shore R. Co. vs. Ohio, 173 U. S. 285, l. c. 301, said:

> "Certainly, the state of Ohio did not endow the plaintiff in error with the rights of a corporation for the purpose simply of subserving the convenience of passengers travelling through the state between points outside of its territory. 'The question is no longer an open one,' this court said in Cherokee Nation vs. Southern Kansas Railway Co., 135 U. S., 641, 657, 'as to whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and therefore subject to governmental control and regulation. It is because it is a public highway and subject to such control that the corporation by which it is constructed and by which it is to be maintained may be permitted, under legislative sanction, to appropriate property for the purpose of a right of way, upon making just compensation to the owner, in the mode prescribed by law.' In the construction and maintenance of such a highway under public sanction the corporation really performs a function of the sate. Smyth vs. Ames, 169 U. S. 466, 544. The plaintiff in error accepted its charter subject necessarily to the condition that it would conform to such reasonable regulations as the state might from time to time establish that were not in violation of the supreme law of the land. In the absence of legislation by Congress, it would be going very far to hold that such an enactment as the one before us was in itself a regulation of interstate commerce. It was for the state to take into consideration all the circumstances affecting passenger travel within its limits, and, so far as practicable, make such regulations as were just to all who might pass over the road in question. It was entitled, of course, to provide

for the convenience of persons desiring to travel from one point to another in the state on domestic trains. But it was not bound to ignore the convenience of those who desired to travel from places in the state to places beyond its limits, or the convenience of those outside of the state who wished to come into it. Its statute is in aid of interstate commerce of that character. It was not compelled to look only to the convenience of those who desired to pass through the state without stopping. Any other view of the relations between the state and the corporation created by it would mean that the directors of the corporation could manage its affairs solely with reference to the interests of stockholders, and without taking into consideration the interests of the general public. It would mean, not only that such directors were the exclusive judges of the manner in which the corporation should discharge the duties imposed upon it in the interest of the public, but that the corporation could so regulate the running of its interstate trains as to build up cities and towns at the end of its line or at a favored point, and by that means destroy or retard the growth and prosperity of those at intervening points. It would mean also that, beyond the power of the state to prevent it, the defendant railway company could run all its trains through the state without stopping at any city within its limits, however numerous its population, and could prevent the people along its road within the state who desired to go beyond its limits from using its interstate trains at all, or only at such points as the company chose to designate. A principle that in its application admits of such results cannot be sanctioned."

In Cleveland etc. R. Co. vs. Illinois, 177 U. S. 514, the right of the company to operate through trains, stopping only at such points as the company determined was upheld, because it was admitted that the company furnished a sufficient number of regular passenger trains to accommodate all the local travel. The Court in no measure qualified its opinion

in the Lake Shore case, but held that case to be clearly distinguishable. They said, p. 521:

> "While, as we held in the Lake Shore case, railways are bound to provide primarily and adequately for the accommodation of those to whom they are directly tributary, and who not only have granted to them their franchise, but who may have contributed largely to the construction of the road, they are bound to do no more than this, and may then provide special facilities for the accommodation of through traffic. We are not obliged to shut our eyes to the fact that competition among railways for through passenger traffic has become very spirited, and we think they have a right to demand that they shall not be unnecessarily hampered in their efforts to obtain a share of such traffic. It is evident, however, that neither the greater safety of their tracks, the superior comfort of their coaches or sleeping berths, nor the excellence of their tables would insure them such share if they were unable to compete with their rivals in the matter of time. The great efforts of modern engineering have been directed to combining safety with the greatest possible speed in transportation, both by land and water. The public demands this; the railway and steamship companies are anxious in their own interests to furnish it, and local legislation ought not to stand in the way of it.
>
> With no disposition whatever to vary or qualify the cases above cited, neither the conclusions of the court nor the tenor of the opinions are opposed to the principle we hold to in this case, that, after all local conditions have been adequately met, railways have the legal right to adopt special provisions for through traffic, and legislative interference therewith is unreasonable and an infringement upon that provision of the Constitution which we have held requires that commerce between the states shall be free and unobstructed."

The bounden duty of the company "to provide primarily and adequately for those to whom they are directly tributary, and who not only have granted to them their franchise, but

who may have contributed largely to the construction of the road," as is in fact the case here, will prove of small value to those to whom that duty is due if the cost of local travel is increased by the establishment of through trains with "the superior comfort of their coaches or sleeping berths and the excellence of their tables," and that cost is to be charged to the local traveler, for whose benefit it was not incurred and who is denied the superior comfort of the coach and the excellence of the table. The primary obligation is thereby made secondary, and in less degree only than if entirely neglected. The benefits to which the people of the State are entitled are impaired if the price demanded for their bestowal is enhanced. Admit the principle that the local and through business may be separately conducted, and that the local business, reduced to such limits as the company may determine to be for its own pecuniary interest, must sustain its own charges as a distinct business, and there is a practical end of the obligation of the company to serve the people of the State which gave it life.

In Mo. P. Ry. Co. vs. Kansas, 216 U. S. 262, the Board of Railroad Commissioners, upon the petition of residents along the line, directed the company to operate a passenger train over its Madison branch. The company refused obedience to the order, because the receipts from the business were insufficient to meet the cost of operation. The Court, following the Atlantic Coast Line case, 206 U. S. 1, held that the company could not thus excuse itself. The Court said:

> "The fact that the performance of the duty commanded by the order which is here in question may, as we have conceded for the purpose of the argument, entail a pecuniary loss, is, of course, as declared in the Atlantic Coast Line case, as a general rule, a circumstance to be considered in determining its reasonableness, as are the criteria indicated in the opinion in that case. But where a duty which a corporation is obliged to render is

> a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are, in the nature of things, paramount, since it cannot be said that an order compelling the performance of such a duty at a pecuniary loss is unreasonable. To conclude to the contrary would be but to declare that a corporate charter was purely unilateral; that is, was binding in favor of the corporation, as to all rights conferred upon it, and was devoid of obligations as to duties imposed, even although such duties were the absolute correlative of the rights conferred."

The ruling of the Court, however, would be of no practical effect if the company could, regardless of the nature and value of the service rendered by it, impose a charge for that service sufficient to make it profitable.

The duty owing by the company to the people of the State which chartered it must be performed so long as the corporate rights and powers which are the correlative of that duty are retained. And the duty is to render the service for a reasonable charge, the nature and the value of the service being considered. Cost is an element, but only an element to be considered with others, in the determination of what is a reasonable charge.

The right and duty of operating the Carrollton branch of the Burlington railway in Missouri were not thrust upon the company, but voluntarily assumed by it. If the revenues are only one-half of the expenses and there is no prospect of improvement in the situation, the company has made a bad purchase. But so long as it holds to the right it must perform the duty, and it may not double its charges therefor simply that it may convert a bad bargain into a good one.

Rates for State passenger service should, under existing conditions, be less than for interstate. That there is a difference in the service, and that the difference is in favor of

the interstate travel, because more of this is competitive, is recognized by the Court in Cleveland etc. Ry. Co. vs. Illinois, *supra*.

That State travel is in itself and under similar conditions more expensive than interstate, while asserted by the company in this case, is denied by the uniform course of railroad practice from the beginning. The contention now made has nothing to rest upon but the difference in average length of haul which for any purpose here involved is not of material consequence.

Length of the haul has never been taken into the account anywhere in determining passenger rates. The charters of some of the early companies fixed a maximum, and did so on the mileage basis strictly. And the companies themselves, when free to act as they deemed just, unconstrained by law or by competitive conditions, did the same. Mr. Eustis, the Company's witness, is very explicit as to this. He has been with the Burlington continuously since 1876. The rate then was five cents per mile. It was reduced by the Company to four cents in 1878 or 1879, and prior to 1883 was reduced on the main lines to three cents. All over the United States, he says, in the absence of legal compulsion and the stress of competitive conditions, the rate was by the companies themselves fixed at a certain amount per mile. (4-4373.)

It does not require experts to determine the appropriate basis of charge. In the case of passenger traffic the measure of charge should be the service rendered. Who so gets the least and the poorest service should pay the least.

Passenger service is conducted on regularly scheduled trains. They set out from a given place at a given time, make prescribed stops, run upon a fixed time schedule to a certain destination.

Whosoever can accommodate himself to the prescribed stops can ride upon the train. He may journey from begin-

ning to the end of the run, from an intermediate stop to the end of the run or from an intermediate stop to an intermediate stop.

The cost of his carriage per mile is not affected by the distance he rides, except as to the possible contingency of personal injury due to the larger element per mile of getting on and off the trains, and this is absolutely negligible. No one has ventured to ascertain it. The risk of injury from collisions or other accidents on the road is and can be no greater per mile in the case of short rides than in long ones.

There is assumed to be a greater terminal cost per mile for short rides. That is for the same number of miles there is a greater use of terminal facilities and terminal service. There is more sitting in the station, more lounging upon the platform and more buying of tickets.

But no stations are built exclusively for local use, and no ticket agents are employed exclusively for local service. No witness offers any figures on the subject—nothing but opinions. It is a fact, however, that if through passengers use terminals less per mile, they use more expensive terminals, for these are at the large centers of population and business. And all the expense of soliciting business is incurred in connection with through business. The local noncompetitive business needs no looking after of this kind.

The equipment for through business is everywhere more expensive. The local train is shunned because of its inferior accommodations and because it is sidetracked and subordinated in every way to the through trains.

There is an attempt to show that the local train has a greater expense per passenger mile than the through train, but that is nothing to the purpose, for the local carries State traffic and the through carries local traffic, and, besides, any greater cost per passenger mile of operating the local train results from the superior facilities afforded the through train.

The railroad companies, as common carriers, are in duty

bound to carry passengers from and to any and all points between which they do business. The obligation is as binding in the case of one passenger as another. There may be discrimination in service only for public reasons and discrimination in charge cannot be justified for any reason.

In the early days of its history, the Burlington, as all other western roads, ran perhaps one passenger train each day, each way over its road. This train made all the stops. No station was too insignificant for its attention.

When this was the case, it had no competition and was constrained by no law. It charged a flat rate per mile of travel. This charge expressed the opinion of its management of what was just. And it was demonstrably just.

The train set out at its appointed time and ran over its appointed course, stopping at every prescribed place, whether any one rode upon it or not. It was possible that a run would be made without a single passenger. It did not wait until it was ascertained that somebody wanted to ride upon it that day. It was assumed that somebody would use it.

Whether that train was filled with passengers or whether it ran with none, made no practical difference as to the expense of its operation. There was in either case the same number of cars, and the same number of operatives. The burden of human freight would add nothing of consequence to the work the engine had to perform and would not show itself in the final expense. The presence of passengers added a single element of cost, and that a very small one, that incident to the risk of personal injury.

If the train was used to some extent, as no doubt was universally the case, and the passengers were of all sorts, State and interstate, short distance and long distance, how should the expense of its operation and the added margin of profit be divided among them? The cost was incurred without regard to the use of it by any passenger in particular, and in like manner the right to the margin of profit existed.

It added nothing to the cost to add to the number of passengers, unless the addition was to the very welcome extent of requiring more cars, which would diminish the cost per passenger mile. But take the usual case of the same equipment, and the number of passengers, and the distance traveled by each, made no difference in cost. How, then, we repeat, should that cost be divided? We answer that it should be in the measure of the service rendered to each.

This was the rule recognized in the early charters fixing a mileage rate; it was the rule recognized by the company itself, when, free to do as it thought to be just and unconstrained by competition, it prescribed a mileage rate; it is the rule prescribed by the statutes of every state in the Union, and it is the rule which underlies the long and short haul provision of the interstate commerce law.

It is the just rule. For no part of the cost of operating the train has been incurred because of any particular passenger. It was all incurred whether he rode or not. There was a duty equal in its obligation to serve the local as well as the through passenger. The one was as essential to the prosperity of the company as the other. An exclusive through business is not desirable for a railroad company. Where it exists it means transit through a desert or over sterile mountains. Through business is finally made up of local business. Local business is country business. Through business is from city to city. But we cannot dispense with the country that lies between the cities, and why discriminate against it?

When we consider the problem in its primitive phases it is simple enough. With one train over the road each way each day, making all the stops, the case is plain. This was illustrated by the case of the Burlington branch lines which extend from St. Joseph, Missouri, one to Villisca, one to Creston and one to Chariton, the three last named towns being in the state of Iowa. On each of these branches there was one train, a daylight train each way, each day, stopping

regularly at every station along the line and having the same class of cars for all passengers. The witness, Bethard, assistant general manager of the M., K. & T. Railroad, had difficulty in bringing himself to acknowledge that the proper cost charge per passenger mile in such case would be the same, whether the travel of a passenger was wholly within either Iowa or Missouri, or whether it crossed the state line. (4-4091 to 4093.) But he finally agreed that there would not be any difference in such case, and this was the view of the Court also.

The principle is not altered by the extension of the road and the growth and development of the country. Conditions of railroad travel between St. Louis and Chicago were originally as simple as they are now between St. Joseph and Villisca. When one train each way stopped at all the stations and did all the work, and there was no difference in the cars employed, the service rendered to each passenger being of the same kind, the rate was the same per mile to all, and it was so, because the cost charge was properly so distributable. And this remained true, no matter how much the number of trains was increased, so long as each train was scheduled to make all the stops. The principle of the Interstate Commerce Law would forbid a greater charge for lesser travel. If that principle is a just one, it is applicable in this controversy, because of its justice. The law as law, as the expression of the sovereign will, has force only when State lines are crossed, but the principle is universal because it is just. And so long as there was but one railway between Chicago and St. Louis, nobody would think of applying anything but a uniform mileage rate, charging each passenger in the measure of the service rendered.

Other lines are built between the cities, and competition arises for travel between them, the intermediate points on each line being unaffected. One company, to secure a greater portion of this through travel, puts on what is called a

through train, one which does not make all the stops, but only the county seats and larger towns. All who can, local as well as through travelers, naturally take this faster train. The other companies follow the example set, and not only do this, but make two, three or more of the trains through, until they have but one train for the limited local travel, which nobody uses except upon compulsion. The through train is equipped with parlor, sleeping and dining cars; it runs on a faster schedule and is given the right of way. The local train is on a slow schedule, uses the cast-off cars of the through trains, takes the side track whenever the through train comes along, and now for this inferior service it is proposed to impose a higher charge than for the better service.

And why? It is said to cost more. And how is this greater cost arrived at? The through trains, running between two large cities, which may be in different states, as Chicago and St Louis, or in the same state, as St Louis and Kansas City, having better accommodation and making better time, stopping at all the larger places on their line of run, and only at the larger places, get the larger portion of the total travel, State and interstate, and so considered apart may have a lower cost per passenger mile of the business done. But there are people who wish to go to or from the smaller places along the line at which the through trains do not stop. The volume of this business, State and interstate, is not so large as that done on the through trains between the cities and large towns, but the company may not neglect it; the law demands, from consideration of justice and the general welfare, and the interest of the company itself requires, that the people of the villages and of the way stations be served, and so the local trains are put on. The line has been stripped of the most and the best of its business by the through trains, and so there is comparatively little for the local train to do. For this reason the service is rendered through a train inferior in

its equipment and accommodation, and inferior in its rights as against other trains, and yet because of the lesser volume of travel upon it, considered apart, the cost per passenger mile may be greater than in the cost of the through trains. And this greater cost for inferior service, it is insisted, shall be borne by the local service. The very reverse is the rule of justice, the very reverse is required by the public nature of the functions which the railroad company has undertaken to perform. The equal right of the dwellers upon the farms and the villages cannot be otherwise secured.

The greater cost of local service is entailed for the benefit of the through business. For the benefit of the through travelers, the through trains have been established and the disparaged local passengers precluded from riding on them. For the benefit of the through travelers, the local train is established, with its cheap equipment, its lesser comforts and its greater perils. That the through traveler may fare with speed, comfort and safety, the local passenger is delayed, discommoded and imperilled, and in the measure that he is stripped of the advantages he once enjoyed, the charges against him are increased.

And the discrimination may be carried to such extent, that some local trains may be established which, while stopping at all stations, serve so few people that their cost considered in and of itself is actually prohibitive, and the company's managers with a show of public spirit will say: these trains do not pay axle grease, but we operate them out of mere favor to the denizens of the little towns at which our profitable trains do not stop. They may believe themselves, but it is not true. They serve the little towns because they must, and they serve them in the meagre and factitiously expensive way they do because it profits them to do so. In very truth they rather slight than serve the small town, and the greater the slight the greater they would make the charge.

We do not complain of the discriminating service, whether it is the result of the mere stress of competition, or whether it is from a motive of greater good to the greater number. We recognize the right of the company to order the conduct of its business in such a way as to secure the greatest efficiency and economy in operation and render the best service to the public as a whole. We do object, however, to the attempt to charge the cost of discrimination against those who suffer from it, rather than against those who are favored by it. We want human beings treated as well in this respect as cattle are treated or as dead freight. Fast freight pays more than slow freight. Palace stock cars and refrigerator cars carry a higher rate than ordinary ones. Tea trains, fruit trains are charged more than coal trains. It is only in the passenger service that the best equipment is the cheapest, that the luxurious, well cleaned and well served Pullman cars cost less than the foul smelling crowded half baggage and half passenger. It is only when they deal with men, women and children that the companies make those pay most who get least.

With similar equipment the local passenger can fairly be charged with his mileage proportion of the cost of operation, and with inferior equipment he should be charged less. To charge in this case the State traffic with the cost of operation on the basis of revenue is unjust, because the revenue per mile actually received from the State traffic is greater than that received from the interstate. To a certain extent, too, just how great is not shown, the State service is inferior. We may waive this, because the measure of inferiority is not clearly shown, and insist only that State service shall be charged with expenses in the measure of the use it makes of the property involved, that is upon the passenger mileage. Taking the Sturgis statement as a basis, and apportioning expenses upon the mileage basis, we have a very different result from that declared by the

court. The State passenger miles for the year ending June 30th, 1908, were 82,266,410 and the interstate 96,872,744. This would charge the State passenger business with $1,301,908 and leave a net income of $309,794.92. The value of the property assignable to the State passenger business on the mileage basis is $6,721,061.54, and the net earning of $309,794.92 are 4.6 per cent on the amount.

We believe, however, that we have demonstrated the Sturgis statement of expenses for 1908 to be unworthy of reliance, and reducing the expenses for Missouri from 83.63 per cent of the earnings to 74 per cent, the average for the system, again computing State passenger expenses upon the mileage basis, we have an expense of $1,151,729.74. This leaves a net income of $459,972.28, or nearly seven per cent, on the property involved assigned on the mileage basis. A more favorable result follows if we make proper deduction from the inflated expense account for maintenance of equipment and way and structures.

IN CONCLUSION.

The burden was upon the company to show by evidence, definite, competent and credible, by the facts of experience under it, of which the company and the company alone had knowledge, that the result of the law's operation was to confiscate its property. If the evidence is meager and insufficient, if it does not present the facts, and all the facts, essential to an intelligent comprehension and determination of the controversy, that is the fault of the company, and it may not supply the want by the loose conjectures, elastic opinions or wholesale conclusions of interested witnesses. If as to any material matter we are, because of the absence of proof, driven to mere inference, if indulged at all, that inference must be in favor of the statute. The one piece of evidence afforded by the com-

pany, which is definite in its terms, although this is wanting in essential details, the Sturgis exhibit of earnings and expenses for the year 1908 is shown to be unworthy of credit in its statement of expenses. It appears affirmatively that the reduction of rates, for the year of trial, unfavorable a time as it was for the test, resulted in a large and continued increase in the volume of business and the earnings therefrom. The company's business in its entirety is certainly profitable. The net earnings are sufficient to pay the interest on its bonds, and a large dividend, increased while this litigation was pending, upon its shares, and the portion of the business here involved has contributed its full share to those earnings, unless it is charged far beyond its full share with the cost of making them.

For the reasons presented in parts I, II and III of this brief, appellants respectfully ask that the final decree and amended final decree rendered in the circuit court in case No. 326 be reversed, with instructions that the injunction be dissolved and the original, amended and supplemental bills dismissed. That the action of the circuit court in case No. 334 be affirmed in reference to its action on the matters therein presented.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1910.

Supt. U. S.
FILED.
OCT 11 1910
JAMES H. McKENNEY

No. [redacted]

JOHN A. KNOTT, H. R. OGLESBY, AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

vs.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

No. [redacted] 13412

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, APPELLANT,

vs.

JOHN A. KNOTT, H. R. OGLESBY, AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY GENERAL OF THE STATE OF MISSOURI.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

SUPPLEMENTAL BRIEF FOR APPELLANTS IN CASE No. 326 AND FOR APPELLEES IN CASE No. 334.

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(21,821 and 21,837.)

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APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

SUPPLEMENTAL BRIEF FOR APPELLANTS IN CASE No. 326 AND FOR APPELLEES IN CASE No. 334.

I.

THE COMPANY SHOULD NOT IN THIS PROCEEDING BE REGARDED AS ENTITLED TO ANY RETURN UPON THE VALUE OF ITS FRANCHISE.

The court below found and held that the company was entitled to a return upon the value of its franchise.

It is not so entitled, even although the State taxes its franchise.

Willcox *vs.* Consolidated Gas Co., 212 U. S., 19.

Mr. Sturgis, the auditor of the complainant, testified (Record, vol. V, p. 4745) and introduced an exhibit for the year ending June 30, 1908, prepared by him (Exhibit 100, Record, vol. V, pp. 5096-8), from which it appeared (p. 5098) that the assessment of the property of the company for the taxes of the year 1908 by the State Board of Equalization was $17,724,302.61, that being, in the judgment of the board, one-third of the actual value of the property, and that therefore the value of the property was to be considered three times that amount, or $53,172,907.83 (also p. 5092).

It was agreed on the trial of the case below that the assessments of railroad property made by the State Board of Equalization for the purposes of taxation were one-third of what the board regarded as the actual value (Record, vol. I, p. 1039).

The assessment of complainant's property for 1908 was offered in evidence by the defendants (Record, vol. V, p. 4773; Exhibit G, Record, vol. V, pp. 5191-5224). The total amount of the assessment appears in the summary of the different lines of complainant's road on page 5224, and is $16,849,302.61, instead of $17,724,-302.61, as stated by Mr. Sturgis. But this difference is, presumably, to be explained by the fact that under the

law of the State (Revised Statutes of 1899, sec. 9360, p. 2174) a certain part (and it is a relatively small part) of railroad property is assessed by the local authorities and not by the State board, and the difference in these amounts is supposed to be the taxable value of that part assessed by the local bodies and has been added to the State board total.

But in the assessment of the State board, $16,849,-302.61, and, likewise, in Mr. Sturgis' amount, $17,724,-302.61, is also included one-third of the value of the franchise of the complainant as estimated by the board (Taliaferro's Exhibit 103, vol. V, p. 5102, near bottom of page). The constitution of the State (Article X, sec. 5, Revised Statutes of 1899, p. 104) provides for the taxation of the franchises of railroad corporations.

Under this provision the State board has uniformly assessed the value of the franchises of railroad companies and certain other corporations under the head of "all other property" (Record, vol. IV, pp. 4524-5).

For the purposes of the assessment of 1908 the complainant's property was regarded as consisting of twenty-one different lines, and each line was assessed separately. And at the end of the assessment tables a summary footing of the entire assessment was made by the board. The action of the board as to these different lines appears in Record, vol. V, pp. 5191-5224, the footing of the whole being on page 5224.

The valuation placed on the franchises of the different lines of the complainant's property, under the designation of "all other property," was as follows:

$1,031,042.15 (p. 5193).
274,754.15 (p. 5194).
29,819.30 (p. 5195).
23,100.05 (p. 5196).
123,767.34 (p. 5198).
501,574.97 (p. 5201).
2,594.56 (p. 5202).
26,699.80 (p. 5203).
33,733.85 (p. 5204).
12,315.11 (p. 5205).
789,507.26 (p. 5207).
600.00 (p. 5208).
92,564.00 (p. 5210).
117,020.70 (p. 5213).
63,612.75 (p. 5215).
16,440.02 (p. 5216).
73,461.78 (p. 5218).
23,493.79 (p. 5220).
15,451.45 (p. 5221).
14,672.50 (p. 5222).
195,828.00 (p. 5224).

Total, $3,462,053.53.

This is a little more than 19.5 per cent of $17,724,302. There should therefore be deducted from Mr. Sturgis' $53,172,907.83 a sum equal to three times the assessed value of the franchise—that is, $3,462,053.53 × 3 = $10,386,160.59. The remainder thus produced is $42,786,747.24. Mr. Sturgis said (Exhibit 100, vol. V, pp. 5096-8) that the gross State freight earnings were 12.83 per cent of the total earnings of all kinds of the company in the State. Therefore, he said, the value of that part of the property used in making these earnings was 12.83 per cent of the total value of all the property of the company in the State—that is, $6,822,084.07—and that the complainant was entitled to realize from its State freight business an adequate net return on that value.

But 12.83 per cent of $42,786,747.42 is $5,489,539.67, which is $1,332,544.40 less than the amount upon which Mr. Sturgis says the State freight business should produce a reasonable return.

It will be observed that the court in its findings as to the total value of the property (Record, vol. V, p. 5311), as to the receipts from State and interstate freight, respectively (p. 5315), as to the value of that part of the property properly assignable to the State freight business (p. 5324), and as to the amount which would represent 6 per cent interest thereon (p. 5324), adopted Mr. Sturgis' exact figures as contained in Exhibit 98 (pp. 5090-2) and Exhibit 100 (pp. 5096-8).

And as to the amount of State freight expense upon the basis of equal cost in proportion to revenue (p. 5324), the amount of net revenue upon that basis (p. 5324) and the amount of deficit of the State freight business cost 50 per cent more in proportion to revenue than interstate (p. 5324), the findings are so near the conclusions of the two exhibits that the differences are insignificant, and it is fair to say that the court substantially adopted those exhibits.

Mr. Taliaferro in Exhibit 103 (vol. V, pp. 5101-3), which is fully explained in his testimony (vol. V, pp. 4763-73), found the State freight earnings for the year ending June 30, 1908, to be $1,612,272.97, about $32,000 more than Mr. Sturgis, and that they were 13.09 per cent of the gross earnings of the company in the State (p. 5102) instead of 12.83 per cent, as calculated by Mr. Sturgis.

If we follow Mr. Sturgis' own method at this point, the value of that part of the property used in the State freight business is 13.09 per cent of $42,786,747.24 (the value of the whole property, excluding the franchise)—that is to say, $5,600,785.21.

Mr. Taliaferro says (p. 5102) that if the cost of doing State freight business is the same per ton mile as interstate the net earnings on State freight business in the year 1908 were $779,283.81.

This is a return of 13.9 per cent on the valuation of $5,600,785.21.

If the cost of the State freight business per ton mile is 30 per cent more than interstate, the net earnings of that business for 1908 were $595,309.21 (p. 5102).

This is a return of 10.65 per cent on the valuation of $5,600,785.21.

If the cost of the State freight business per ton mile is 50 per cent more than interstate, the net earnings of that business for that year were $479,325.23 (p. 5102).

This is a return of 8.55 per cent on the valuation of $5,600,785.21.

The foregoing calculations are based upon Exhibits 98 (p. 5090) and 100 (p. 5096) offered by the company as showing its operations for the year ending June 30, 1908. But, as has already been suggested, these exhibits in respect of their showing of operating expenses 83⅞ per cent of gross earnings ought not to be accepted. To harmonize with the testimony of Mr. Sturgis as to previous years, and the evidence as to the percentage of operating expenses of other roads for 1908, no sum should be allowed for operating expenses in excess of the equivalent of 75 per cent of the earnings. At least 10 per cent should be deducted from these alleged expenses, which would reduce the percentage to about 75 per cent.

If this be done, it at once deducts from the $707,902.27 expense shown in the table (p. 5102) $70,790.27, and adds a like amount to the net balance of $779,283.81 (p. 5102), changing this net balance to $850,074.08;

and this last amount is 15.17 per cent on the valuation of $5,600,785.21.

Or, if it be done, it at once deducts from the $891,-876.87 expense shown in the same table $89,187.68, and adds a like sum to the net balance of $595,309.21 (p. 5102), increasing this net balance to $684,496.89; and this last amount is 12.22 per cent on the valuation of $5,600,785.21.

Or, if it be done, it deducts from the $1,007,860.85 expense shown in the same table $100,786.08, and adds a like sum to the net balance of $479,325.23 (p. 5102), increasing the net balance to $580,111.31; and this last amount is 10.35 per cent on the valuation of $5,600,-785.21.

II.

AN EXTRAVAGANT VALUE IS ASSIGNED BY THE DECREE TO THAT PART OF THE PROPERTY EMPLOYED IN THE STATE FREIGHT BUSINESS.

The circuit court assigned to the State freight business such a proportion of the total value of complainant's property as the gross State freight earnings bore to the total gross earnings of the company in the State, and then held that the net earnings of the State freight business ought to be sufficient to afford to the complainant an adequate return upon the value so as-

signed. No sound reason exists for such a division of the value.

It is to be remembered that the revenue per ton mile from State freight is more than twice as large as that from interstate freight. It follows that if the gross revenues from State and interstate business were equal it would mean that the number of ton miles of freight handled in the State business would be only about one-half the number in the interstate business—that is, the State business would use only one-half as much property as the interstate—but by the adoption of this method the division of the value of the property would be an equal one, the same amount being assigned to the State and to the interstate traffic.

If a mile of substructure main road bed and track is worth, say, $15,000 while a ton of interstate freight is being hauled over it, it is inconceivable that within the next hour perhaps, while a ton of State freight of the same character is being carried over that same mile, the value of that mile of substructure should jump to $30,000, simply because the carrier receives twice as much for transporting one ton as for the other.

The result arrived at in the court below was reached by regarding the value of property while being used for the carriage of State freight as double its value while employed in interstate business, while the truth is, as demonstrated by the evidence, that the State freight business earns approximately the same gross

revenue from the use and employment of $5,000 worth of property as the interstate business derives from the use and employment of $10,000 worth of property.

The fallacy of such a method of division is apparent when we consider that an act of the legislature, such as is attacked in this case, would if enforced automatically *reduce the value of the property required for State freight business,* because, and only because, it would reduce the State rates; and such reduction in value was *prevented* simply by the injunction of the court restraining the enforcement of the law.

Certainly, a method more nearly correct would be to divide the value of that portion of the property employed in the freight business between State and interstate in the proportion that the number of ton miles of freight in the two classes bear to each other, as pointed out by Mr. Taliaferro (Record, vol. V, p. 4988).

Thus in this case *revenue,* instead of actual cost, has determined the expense of the State freight business; *revenue,* instead of actual use, has determined the amount of property employed in that business. Indeed the "revenue theory" is the keynote of the decree of the circuit court. No other considerations were permitted to interfere with its application.

Therefore, if it be true that approximately twice its real value was assigned to that part of the property employed in the State freight business, it follows that the actual percentage of return on the investment is

approximately double that shown in the calculations of the experts for the State, because all those calculations were based upon the value of the property fixed by Mr. Sturgis.

Respectfully submitted,

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JAMES H. MCKEN

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

JOHN A. KNOTT *et al.*, *Appellants*,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Appellee.*

No. [redacted]

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Appellant*,

vs.,

JOHN A. KNOTT *et al.*, *Appellees.*

No. [redacted]

Appeal (No. 326) and Cross-Appeal (No. 334) from the Circuit Court of the United States for the Western Division of the Western District of Missouri.

Brief for Chicago, Burlington & Quincy Railroad Co.

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Brief for Chicago, Burlington & Quincy Railroad Co.

STATEMENT.

1. THE APPEAL AND CROSS APPEAL.

(a) *Appeal in case No. 326.*

Case No. 326 is an appeal by the Railroad Commissioners and Attorney General of Missouri, seeking to reverse a decree of

the Circuit Court of the Western Division of the Western District of that state in favor of the Chicago, Burlington & Quincy Railroad Company, enjoining the enforcement of the two-cent passenger and the freight carload maximum state statutory rates because as a matter of fact they were confiscatory.

(b) *Cross Appeal in case No. 334.*

Case No. 334 is a cross appeal in the same case, seeking, as a matter of precaution and to have certain other questions decided, to review the action below refusing to hold that the rates were invalid regardless of their confiscatory nature, so that the result below would, if necessary, be maintained on grounds other than those there adopted.

(c) *One, out of eighteen cases below, was unfairly selected by the state for review here, when they were tried below upon evidence taken in all, whereby there is a tendency to confusion and some difficulty in mastering a printed record, great portions of which bear upon other cases than the one represented.*

In the court below each of the eighteen railroad companies having more than 45 miles of road in Missouri, obtained, after final hearing, a decree permanently enjoining the enforcement against it of certain state freight and passenger rate statutes found from 5027 printed pages of evidence (Rec. 213-5240) to be confiscatory. (Opinion, Rec., 5285, findings of fact, Rec., 5305; *St. L. & S. F. R. Co.* v. *Hadley*, 168 Fed. Rep. 419; Rec. 5368, 5370, 5275; 155 Fed. Rep., 220; Rec., 5279.) Case No. 326 is an appeal by defendants from the decree in favor of the Chicago, Burlington & Quincy Railroad Company *only*, while case No. 334 is a cross appeal in the same case. No appeal was taken in the other seventeen cases. A motion to advance was here filed and sustained. The record consists of five large volumes com-

prising 5339 printed pages, of which 133 pages represent all the pleadings, orders and decrees (Rec. 1-54, 61-94, 95-106, 114-116, 5240-5268) separately made in the cases appealed; the remaining 5206 printed pages (Rec. 54-58, 60-61, 94-95, 106-114, 116-213, 5268-5330) represent the portions of the record in the parts of the proceedings common to the entire eighteen cases, and *all* the evidence taken in *all* the cases (Rec. 213), 3651 pages of which were taken in other cases (Missouri Pacific, Rec. 1464-2582; Wabash, Rec. 2583-3685; St. Louis & San Francisco and eight other companies, Rec. 3687-3731, 3767-4742, 4782-5096, 5106-5190, 5226-5239.) There would, therefore, have been little expense, comparatively, to have taken appeals in the other seventeen cases, or to have separately printed only that portion of the evidence applicable to this case. The whole railroad situation in the state would have been presented by appealing all the cases. As it is, the court and counsel must grope through a record applicable to many roads in order to single out and apply such facts only as relate to one. The value of each railway property (Finding, Rec. 5315) and the earnings therefrom and expenses thereof (Findings, Rec. 5315-5326) and actual losses (id.) are entirely different, so that the facts might show that a rate law was confiscatory as to one company and not as to any other, though here confiscation existed as to all. Therefore, the appeal in the Chicago, Burlington & Quincy case *alone* is necessarily prosecuted upon the theory that it is for some reason the *best* road for the appellants' side of the controversy, its earnings being larger (Finding, Rec. 5315-5326), and its interstate business proportionately greater than that of any other company, while its stock and bond issue (Rec. 1383) per mile and much lower. It is also the only road the passenger mileage of which is greater than the revenue, a feature, which in the argument, will cut some figure. The short line necessarily fixes the rate across Missouri (Exhibit 4, Rec., 4806; Finding 3, Rec., 5306.) This is the C. B. & Q. with a distance of 200 miles; other

roads must carry across the state 280 miles. The mileage rate gives returns only upon 200 miles; the long road to obtain this return must go to the expense of carrying 80 miles further. A fair test would have been one case, one agreed to as such, or one actually representative of average conditions. Fairer still would be a presentation of all the cases. *An agreement for a test case was not even requested.* This one case is certainly not any fair test of the state rate legislation applicable to all roads. No favor was extended in not appealing the other cases. While the cases involve interests somewhat public in their nature, there is actually involved in the decree from which the appeal is prosecuted only the validity of the state rates as to *one* railroad. As the cases were tried below together and upon the same evidence, the singling out of the case of one company tends to confusion.

(d) *Numbers and names of the prevailing complainants in the eighteen cases below, with abbreviations commonly used.*

These are:

No. 2988, St. Louis and San Francisco Railroad Company (St. L. & S. F. R. Co.)

No. 2989, The Atchison, Topeka and Santa Fe Railway Company (A. T. & S. F. R. Co.)

No. 2990, The St. Louis Southwestern Railway Company (St. L. S. W. R. Co.)

No. 2991, The Chicago, Rock Island and Pacific Railway Company (C. R. I. & P. R. Co.)

No. 2992, The St. Louis, Kansas City and Colorado Railway Company (St. L., K. C. & C. R. Co.)

No. 2993, The Kansas City Southern Railway Company (K. C. S. R. Co.)

No. 2994, The St. Louis & Hannibal Railway Company (St. L. & H. R. Co.)

No. 2995, The Missouri Pacific Railway Company (Mo. Pac. R. Co.)

No. 2996, St. Louis, Iron Mountain & Southern Railway Company (St. L. I. M. & S. R. Co.)

No. 2997, Missouri, Kansas & Texas Railway Company (M. K. & T. R. Co.)

No. 2998, Chicago, Burlington & Quincy Railroad Company (C. B. & Q. R. Co.)

No. 2999, Quincy, Omaha and Kansas City Railroad Company (Q. O. & K. C. R. Co.)

No. 3000, The Wabash Railroad Company (Wab. R. Co.)

No. 3001, The St. Joseph & Grand Island Railway Company (St. J. & G. I. R. Co.)

No. 3002, Kansas City, Clinton & Springfield Railway Company (K. C. C. & S. R. Co.)

No. 3003, Chicago Great Western Railway Company (C. G. W. R. Co.)

No. 3004, Chicago, Milwaukee & St. Paul Railway Company (C. M. & St. P. R. Co.)

No. 3006, The Chicago & Alton Railroad Company (C. & A. R. Co.)

(e) *Substitution of parties pending the litigation.*

When the original bills were filed, Joseph P. Rice was one of the Railroad Commissioners (Bill, Rec. 3; Answers Rec. 28, 38) and H. R. Oglesby was elected (Amended Bill, Rec., 63, par. 3; Answers, Rec. 96, 103, 104) as his successor, and in his stead, substituted (Rec. 61, par. 1) as a defendant.

The interest of the Chicago, Burlington & Quincy *Railway* Company, lessee, the original complainant below, passed, pending

the litigation, to the Chicago, Burlington & Quincy *Railroad* Company, its lessor, and Elliott W. Major succeeded Herbert S. Hadley as Attorney General. By *consent,* orders (Rec., 114, 115, 172) were entered substituting such parties as such successors with the same effect as if the bills had been originally for the one against the other.

(f) *Separate cases in which evidence was actually taken below, and stipulations as to those in which evidence was not taken.*

While the record does not set forth the form of the orders therefor, yet the facts are recited in the transcript that *in the trial below* (not upon any appeal), the case of the St. L. & S. W., No. 2990 was (Rec., 4686) to abide that of the St. L., I. M. & S., No. 2996; those of the Missouri Pacific, No. 2995, St. L., I. M., & S., No. 2996, Wabash, No. 3000, and Chicago & Alton, No. 3006 were (Rec., 4712, 4713, 4723, 4724) to abide that of the Burlington, No. 2998, those of the Q. O. & K. C., No. 2999, and St. J. & G. I., No. 3001, that (Rec., 4723-4724) of the C. G. W., No. 3003, and that of C. M. & St. P., No. 3004, that (Rec., 4724) of the St. L. & S. F., No. 2988. Thus of the eighteen roads, cases of ten were actually tried, those of the C. R. I. & P., No. 2991 and St. L. K. C. & C., No. 2992 being by consent (Rec., 4686) consolidated for trial purposes, the title to the St. L. K. C. & C. property having in the meantime passed to the C. R. I. & P.

(g) *Findings of fact and decrees.*

The court below made one finding of fact (Rec., 5305-5327, 168 Fed. Rep., 317, 319-337) and filed opinions (Rec., 5286-5304, 168 Fed. Rep., 317, 356; Rec., 5327-5330) covering all the cases though a separate decree (Rec., 5241-5243) was entered as to

each complainant which, upon motion (Rec., 5244-5245) at the same term, was modified (Rec., 5245-5246) in some minor respects.

(h) *Appeal in but one case.*

The Railroad Commissioners and Attorney General appealed only the case of the C. B. & Q. R. Co. (Rec., 5267-5268), severing (Rec., 5249-5256) from the other defendants represented (Rec., 92) by the same counsel, who declined (Rec., 5249-5256, 5267-5268) to join, a decree of dismissal without prejudice (Rec., 5248, par. 4) having been entered as to the injunctive relief sought against them.

With these preliminary suggestions we pass to a more detailed consideration of the particular case presented.

2. ORIGINAL BILL.

(a) *Act of* 1905.

By the general laws (Rev. Sts. 1899, art. 4, chap. 12) of Missouri, as amended in 1903 (Laws Mo. 1903, p. 132; Bill, Rec., 5-6) the Railroad Commissioners were empowered to fix, modify or reduce all railroad freight rates. The maximum passenger rate (Rev. Sts. Mo., 1899, Secs. 1192, 1193) was three cents per mile. The only limit to these rates was the state constitutional requirement (Const. Mo. Art. 12, par. 14) that all rates should be reasonable. In 1905, the legislature fixed (Laws, Mo. 1905, p. 102; Rec., 6-7) maximum mileage rates upon practically all carload freight. This act took effect June 16, 1905, (Const. Mo. Art. 4, Sec. 36, Bill, Rec., 7-8; Answers, Rec., 29.)

(b) *Governor's reluctant approval of the act of* 1905.

The Governor of the state in an elaborate apologetic written approval of the act of 1905 (Rec., 2450, Ex. 54) practically con-

ceding that there had been no legislative investigation of the facts, and that the rates fixed were unjust, thought it his duty not to veto the bill so that the railroads would be in a position to judicially test the validity of the rates fixed, the result of which would be that, in the light of the evidence taken therein, the commissioners or the next legislature could correct any injustice by fixing new rates. This practically invited litigation.

(c) *Filing of the original bill.*

Upon June 16, 1905, the Chicago, Burlington & Quincy *Railway* company, lessee, operating the road of the Chicago, Burlington & Quincy *Railroad* Company, filed a bill (Rec., 1-14) to enjoin the enforcement of the act of 1905, the other seventeen railroads in the state (Rec., 12, 16-18) filing like bills. The defendants were the Attorney General and Board of Railroad Commissioners, who, as part of their general official duties, were required to enforce the act, and three shippers, representatives of the class of persons really interested and to whom accrued the penalties provided. The reason for joining the shippers was that they were clearly the real parties in interest (*M. K. & T. R. Co.* v. *Hickman*, 183 U. S. 53, 60, 61, 46 L. Ed. 78, 84.) The act had omitted to specifically require any officer to enforce it. At that time it was claimed by some that *Smyth* v. *Ames*, 169 U. S., 466, 42 L. Ed. 819 had been so modified by *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, that such omission prevented a suit against the Attorney General or Railroad Commissioners, as it would be one against the state, even though the general duties of these officers required them to act. If, therefore, the court had so held, the action could nevertheless have been maintained against the shippers, and in case the law had been declared invalid, it would have bound the entire class (*Wallace* v. *Adams*, 204 U. S., 415, 425, 51 L. Ed., 547, 562; *West* v. *Rundell*, 2 Mason 90, 29 Fed. Cas., 718, 722, No. 17428.) Since then it has been decided (*Ex*

Parte Young, 209 U. S., 123, 52 L. Ed., 714; *Hunter* v. *Wood*, 209 U. S., 205, 52 L. Ed., 747) that there is nothing in the point, so that it will be unnecessary to give special consideration to the subject, especially since these parties were conditionally dismissed (Rec., 5248, par. 4) and declined to appeal (Rec., 5249-5256), so that no question as to their joinder can here arise (*Joy* v. *St. Louis*, 138 U. S. 1, 34 L. Ed. 843, 858.)

3. Original Restraining Order and Temporary Injunction.

A short restraining order was issued (Rec., 15, 16), the hearing upon which, *at the request* of the Attorney General, was continued until a later date (the order being continued in force), when the application for an injunction was submitted upon the face of the bill, without a controversy as to the facts, whereby was conceded the fact that the rates were confiscatory (Opinion, Appendix, 8.) A temporary injunction was granted (Rec., 19), the defendants *consenting* that the complainant without surety could sign the injunction bond. This at least carried out the spirit of the Governor's written approval (Rec., 2450, Ex. 54) of the act, inviting litigation to test the validity of the rates fixed so as to enable the commission or the next legislature to correct any injustice in the light of the evidence which might be therein adduced.

4. The Original Bill Put at Issue.

Demurrers (Rec., 21-26) to the bill were interposed, argued and denied (Rec., 27), after which answers (Rec., 28-43) and replications (Rec., 50) were filed, the Attorney General appearing (Rec., 24-26, 47-49) as the counsel for the shippers.

5. Reference of the Original Cases.

Defendants filed (Rec. 53) a motion for a reference. Complainants in the eighteen cases filed (Rec., 53) motions to set the cases down for hearing upon (Rec., 53-55) oral evidence under Rule 67 as amended (149 U. S. 793.) The method of trial was discretionary (*Peoria Gas Co.* v. *Peoria,* 200 U. S., 48, 57, 50 L. Ed. 365, 367; *Brown* v. *Grove,* 25 C. C. A. 644, 80 Fed. Rep. 564, 566.) There was ample precedent for the request of complainants, for nearly every previous rate case had been tried by the court without a reference. (*Ames* v. *Union Pac. R. Co.,* 64 Fed. Rep., 165, s. c. *Smyth* v. *Ames,* 169 U. S., 466, 42 L. Ed., 819; *C. M. & St. P. R. Co.* v. *Tompkins,* 90 Fed. Rep. 363; *Milwaukee R. & L. Co.* v. *Milwaukee,* 87 Fed. Rep. 577; *San Diego Land & Town Co.* v. *Tasher,* 110 Fed. Rep. 702, s. c., 189 U. S. 439, 47 L. Ed. 892; *San Diego Land & Town Co.* v. *National City,* 74 Fed. Rep., 79; s. c. 174 U. S. 739, 43 L. Ed. 1154; *Flume Co.* v. *Swither,* 2 C. C. A. 548, 90 Fed. Rep. 164; 44 C. C. A. 143, 104 Fed. Rep. 706; *San Joaquin & Kings River Canal & Irrigation Co.* v. *Stanislais County,* 113 Fed. Rep. 930, s. c., 192 U. S. 201, 48 L. Ed. 406; *Boise City Irri. & Land Co.* v. *Clark,* 65 C. C. A. 339, 131 Fed. Rep. 415.)

The court below, however, ordered (Rec. 56, 57) that the causes be referred to Hon. Frank L. Schofield, to hear, until further orders, such of the cases as the parties should "at the beginning of the inquiry agree to be heard." There was some controversy (Rec., 3696-3732) as to the number of cases which should in the first instance be tried, but the evidence upon the original bills was agreed to be first taken in the cases of the C. B. & Q., No. 2998 below, 1234 printed pages (Rec., 229-1463), Mo. Pac., No. 2995 below, 1118 pages (Rec., 1464-2582), and Wabash, No. 3000 below, 1103 pages (Rec., 2583-3686), the master fixing (Rec., 93), June 18, 1907, as the time for the argument before him. Beyond the return of the evidence pursuant to order (Rec.,

114) of court, *made by consent* (id.) nothing more was done by him. No question arises as to the reference, because the parties afterwards *agreed* to (Rec., 114, 169, 213), and did try the cases before the court upon oral evidence, and that theretofore adduced before the master.

6. Appeal of Governor for New Laws.

An enormous amount of evidence was taken before the Master, though not all of it, fairly indicating that the rates fixed by the act of 1905 could not be upheld. The legislature of the state then met for its 1907 session. The Governor in his general message (Rec., 2449, 2550, Exhibit 53) to that body, and afterwards in a special message (id. Exhibit 52) urged some changes in the act of 1905 because it was defective with respect to penalties and had been to some extent shown by the evidence to be illegal and unjust. He also submitted a report (Appendix hereto No. 9) of the Attorney General to the same effect, which also suggested so fixing the law that resort could not be had to the federal courts to test the validity of the rates to be fixed.

7. Passage of the Acts of 1907.

(a) *The freight acts.*

The legislature then passed a new maximum freight carload rate act (Laws Mo. 1907, p. 171; Amended Bill, 64-66) increasing in some respects the rates fixed by the act of 1905, lowering them in some instances, creating very severe additional penalties, and repealing all of the prior act, *except the penalties* incurred thereunder, *thus making it necessary to continue the litigation as to the old act*, though there should have been no question that its efficacy was at an end (*Dinsmore* v. *Express Co.*, 183 U. S. 115, 46 L. Ed. 111) nor that it was void so far as concerned the

penalties imposed (*Ex Parte* Young, 209 U. S. 123, 52 L. Ed. 714; *Hunter* v. *Wood*, 209 U. S. 205, 52 L. Ed. 747; *Willcox* v. *Cons. Gas Co.*, 212 U. S. 19, 53 L. Ed. 382), and that no penalty could have accrued while its enforcement was enjoined. This act of 1907 added stone as one of the commodities, the rates upon which were fixed, it having been covered with a different rate by a former separate act (Laws Mo. 1905, p. 104, Rec., 62). Still another act fixed the rates per carload of fruits (Laws 1907, pp. 187, 188; Rec., 66-67.) Another act (Laws 1907, p. 176; Rec., 67) required shippers of carload lots to be carried free. The state court has since held (*McCully* v. *R. Co.*, 212 Mo. 1) the latter act to be void and beyond the power of the state to pass, it unreasonably requiring a service without compensation. The reduction in state freight rates of the C. B. & Q. under the act of 1905, exclusive of that on stone and fruit, was (Rec., 238) $171,122.07, as against (Finding 19, Rec., 5324) $112,533.71 under the act of 1907. As the state rate (Finding 3, Rec., 5306, 5307) necessarily fixed the interstate, the annual reduction in the earnings from interstate was enormous (Ev. Sturgis, Rec., 4746, 5098, Exhibit 101) aggregating $477,647.79 under the act of 1907, and under the act of 1905, $700,487.29.

(b) *Passenger act.*

The same legislature fixed an arbitrary passenger rate (Laws Mo. 1907, p. 170; Bill, Rec., 69-70) of two cents per mile, actually reducing (Rec., 5313, Finding 14) the state passenger annual revenue $394,878.77, the interstate $261,556.41, the latter being the necessary result of the state law (Finding 3, Rec., 5306, 5307.)

(c) *All the acts took effect at the same time and as a whole caused great loss.*

The admitted allegations of the bill (Bill, Rec., 63, 66, 69; Answers, Rec., 96, 97, 103, 104) are that these acts all took

effect June 14, 1907. Such is the provision (Art. 4, sec. 36) of the state constitution. So that while the actual loss of the C. B. & Q. in state freight, not estimating the loss on stone and fruits, was, under the act of 1907, $58,588.36 less than the loss under the act of 1905, yet the reduction of the state passenger earnings overcame this slight gain, the net loss upon the two items aggregating $507,402.48. These figures do not include the losses in the interstate earnings which had to be reduced to meet the state rate (Finding 3, Rec., 5306, 5307.) The interstate passenger annual loss (Finding 14, Rec., 5313) was $261,556.41, and interstate freight (Rec., 4746, 5098, Exhibit 101) $477,647.79 under the act of 1907, and $700,487.29 (Rec., 4746, 5098) under that of 1905. The losses to the other roads, both in the state passenger (Rec., 5313, Finding 14) and freight (Rec., 5318-5326) business was great, in some instances greater in proportion than those of the C. B. & Q. The gross annual state earnings of the latter were (Finding 17, Rec., 5315, 5316) in 1907, freight $1,580,529.64, miscellaneous freight $161,579.41, passenger $1,611,702.92, miscellaneous $731,021.89, or an aggregate of $4,084,833.06. The annual loss on state freight and passenger carriage of $507,402.48 was in a sum equal to more than twelve per cent of the gross state revenue, and about fifteen per cent of the gross state carriage revenue.

8. Amended and Supplemental Bills to Enjoin the Rates Fixed by the Acts of 1907, and Efforts to Avoid the Jurisdiction of the United States Court.

(a) *Each act upon its face showed an attempt to evade such jurisdiction.*

The freight act of 1907 upon its face (Laws Mo. 1907, p. 171; Amended Bill, Rec., 64-66, Appendix 3), imposed upon no one the special duty of enforcing its provisions, but made each

violation the subject of a fixed fine of $5000. So the passenger act (Laws Mo. 1907, p. 170; Amended Bill, Rec., 69-70; Appendix 6) provided only for a fine of $100 to $300 for each offense, and was applicable to all agents. Failure to pay a fine under another provision of the law (Rev. Sts. Mo. 1899, sec. 2680) subjected the offender to imprisonment. It is current history that the Attorney Generals of the various states had been holding conventions to obtain concert of action in respect to state action. Upon the mistaken supposition that such was the result of *Fitts* v. *McGhee*, 172 U. S. 516, 43 L. Ed. 535, the position was assumed that if an act fixing a rate created a criminal penalty and did not in terms impose upon some one a duty to enforce it, then injunction would not lie, as the suit would be one against the state. This contention was in the teeth of *Smyth* v. *Ames*, 169 U. S., 466, 42 L. Ed. 819, and was subsequently here denied. (*Ex Parte* Young, 209 U. S., 123, 52 L. Ed., 714; *Hunter* v. *Wood*, 209 U. S. 205, 52 L. Ed. 747; *Prentis* v. *Atlantic Coast Line*, 211 U. S., 210, 53 L. Ed., 150; *Willcox* v. *Cons. Gas Co.*, 212 U. S., 519, 53 L. Ed., 382.) It is significant, however, that the then Attorney General of Missouri was here permitted to argue the proposition (*Ex Parte* Young, 209 U. S. 123, 134, 52 L. Ed. 714, 719) and obtained one postponement below to await the result of such argument (Opinion, Rec., 5284, 5285, 161 Fed. Rep., 419, 425.) He submitted to the Governor, who transmitted it to the legislature (Appendix 9) a report in which he expressly advised so framing a new law as to prevent the jurisdiction of the federal courts.

(b) *Filing of an amended and supplemental bill.*

The acts of 1907 were to take effect June 14, 1907, (Amended Bill, Rec., 63, 66, 69; Answers, Rec., 96-97, 103-104; Const. Mo., art. 4, sec. 36.) Accordingly, upon June 11, 1907, the complainant in each of the eighteen cases filed a motion for leave to file an amended and supplemental bill then presented to the

court (Rec., 57, 58), giving on the same day, *as required by the court* (Rec., 57) before permitting its actual filing, notice (Rec. 60) to opposing counsel of the application. Thereupon, on June 13, 1907, the court of its own motion (Rec., 58) made an order setting the application for argument, and restraining the enforcement of, or putting in force the new rates. Upon June 14, 1907, the state *obtained a continuance because of the absence* of the Attorney General, and the injunctive and restraining order was continued in force (Opinion, Rec., 5268-5270; Order, Rec., 59.) Upon June 17, 1907, after full argument, an order (Rec., 61) was entered upon an opinion (Rec. 5270-5275; 155 Fed. Rep. 220) that the amended and supplemental bill be filed as of June 11, 1907, the day of its presentation, *that process should be issued thereon*, so the court could in the future decide whether it should be treated as an amended, supplemental, ancillary, dependent or original bill, granting, *by consent*, however (Opinions, Rec., 3748, 5330; Finding 6, Rec., 29) a temporary injunction as to the freight rates, but denying, without prejudice, the application as to the passenger rate pending a test from experience.

9. The Amended and Supplemental Bill.

The amended and supplemental bill (Rec., 61-73) was filed as of June 11, 1907 (Rec., 61.) Process (Rec., 73) was issued thereon, and appearances (Rec., 74, 75) duly entered. This bill set up the facts as to the previous litigation, the passage of the acts of 1907, that they were confiscatory, unconstitutional and invalid for the various reasons hereinafter asserted. It made as additional parties defendant H. R. Oglesby, who, since the filing of the original bill, had been elected to succeed Joseph P. Rice, two individuals as representatives of a class of passengers seeking to avail themselves of the two-cent rate, the county judges and treasurer of Jackson county, upon whom, as officials, devolved

(Mo. Const. Art. 11, sec. 8, Rev. Sts. Mo. 1899, secs. 9824, 9827) the duties of collecting, preserving and protecting, for the benefit of the school fund, all penalties for the violation of the various rate statutes. The theory as to making passengers and the county officials parties was the same as that adopted in making certain shippers parties to the original bill, in the excess of caution because of the contention that suit was not maintainable against the state officers. The case having been dismissed as to these parties, and they having refused to appeal, there is now no questions as to their rights subject to review. Moreover, the law is now settled that the action can be maintained against the state officers (*Ex Parte Young*, 209 U. S. 123, 52 L. Ed., 714.)

10. Attempt to Evade the Jurisdiction of the Court.

Upon June 14, 1907, the day the laws went into effect, and when the continuance was obtained (Order, Rec., 59, Opinion, Rec., 5270-5275) because of the absence of the Attorney General, the latter filed bills against each of the eighteen railway companies in the state courts at Kansas City and St. Louis for an injunction requiring it to put in force both the freight and passenger rates fixed by the acts of 1907, obtaining without notice and causing to be served, restraining orders to the same effect, so that the situation was created of the court below enjoining the enforcement of the rates, and the state courts commanding the railroads to put them in force (Amendment to Bill, Rec., 75-81; Answers, Rec., 100-101.) This was in line with the advice (Appendix 9) the then Attorney General gave as to so framing the laws of 1907, as to avoid jurisdiction in the federal courts.

11. Amendment to Bills and Injunction Against Proceeding in the State Courts.

Upon July 16, 1907, an amendment to the bill (Rec., 75-81)

was filed reciting the facts as to the attempt to carry on the litigation in the state court, and asking an injunction against the prosecution of those cases, which was granted (Rec., 74.) This was upon the theory that the court below had a prior jurisdiction, which it was bound to protect. (*Julian* v. *Central Trust Co.*, 193 U. S. 93, 48 L. Ed. 629; *Wabash R. Co.* v. *Adelbert College*, 208 U. S. 38, 52 L. Ed. 379; *Ex Parte* Young, 209 U. S. 123, 162, 163, 52 L. Ed. 714, 730.) This view was sustained (Opinions, Rec., 5268-5270; 5270-5275; 5275-5279; 155 Fed. Rep. 220; 161 Fed. Rep. 419) below, and subsequently met with the express and emphatic approval of the state court (*State ex rel. Missouri Pacific R. Co.* v. *Williams*, 221 Mo. 227), when after final decrees below a *nisi prius* state court at St. Louis at the instance of the state prosecutor, acting under the direction of the Governor, enjoined putting into force more than the two-cent passenger fare which had been decreed to be confiscatory. The supreme court of the state, by prohibition, promptly met the situation and set aside the injunctive order, holding that the federal court had a jurisdiction which should be respected and its decree could be reviewed upon appeal, but should not be thwarted and evaded. *After that only*, the appeal herein was taken.

12. Demurrers, Answers and Replications.

Demurrers to the new bills were filed (Rec., 82-92) by all defendants, and overruled (Rec., 95) upon an opinion (Rec., 5279-5285; 161 Fed. Rep. 419, 425) withheld for sometime at the request of the state, to await the decision here of *Ex Parte* Young, 209 U. S. 123, 52 L. Ed. 714, in which its Attorney General had presented the question that no state rate could be enjoined if the statute instead of prescribing specific methods for its enforcement, merely made its violation criminal, the method he advised the Governor and legislature to adopt to evade federal jurisdiction. Upon May 12, 1908, answers (Rec., 95-104) were

filed by the state officers, and afterwards adopted (Rec., 213) by all the other defendants. Upon June 1, 1908, before they were due, replications (Rec., 105, 106) were filed and the cases put at issue.

13. Order as to a Trial of All Cases, and Final Submission Thereon.

Upon June 8, 1908, complainants in ten of the cases served notice (Rec., 113) of an application to be made upon June 13, 1908, for temporary injunctions against the passenger rate. The defendants appeared and requested (Rec., 114) a ninety day postponement. *By consent of all parties,* it was then ordered (Rec., 114) that all of the eighteen cases be set for trial for final hearing upon October 5, 1908, before the court upon the testimony theretofore taken by the master in the C. B. & Q., Missouri Pacific and Wabash cases relative to the act of 1905, and such further evidence as might be adduced in open court. Upon October 5, 1908, *at the insistence of defendants* (Rec., 3750) the trial was (Rec., 117) postponed until November 9, 1908. Thereafter, the evidence was all taken and transcribed and all the cases finally submitted (Rec., 171, 4781) upon December 30, 1908.

14. Findings of Fact.

(a) *Defendants' counsel, although asked so to do, refused to submit any requests for special findings, or to point out below any errors or inaccuracies therein.*

"Prior to the argument, the court requested counsel on both sides to submit requests for findings of fact," but counsel for the state officers declined so to do (Rec., 5305), and express leave was given to either party to make application within thirty days to correct any error or inaccuracy therein (Rec., 5315, 5327,

Finding 17, 20.) No such application was made. The periods during which the earnings and expenses were taken were conceded to be representative (Rec., 5307, 5315, Findings 4, 17), Complainants in advance furnished statements to the state's experts (Rec., 5307, Finding 4), the latter being given the fullest opportunity and all the time desired to examine every book and paper of complainants (id., Finding 5), and conceding (id., Finding 6), that the companies' books had been fairly, accurately and honestly kept. The state's experts said (Ev. Taliaferro, Rec., 4557; Hamilton, Rec., 4634) that every courtesy was shown them and every facility extended them to enable them to obtain the facts. The court below will not, therefore, be lightly put in error as to any findings of fact, no complaint on that score having been made until the appeal was taken, months after they were made, and not until an attempt to defeat the decree by the process of the state-court had been held futile. (*State ex rel.* v. *Williams*, 221 Mo. 227.)

(b) *Findings made in all the cases.*

The findings of fact (Rec., 5305-5327) are specific and made in great detail, applying to all the cases. Any effort to summarize them would be an injustice to the case.

For the purposes of this statement it is sufficient now to say that the court found:

First. Practically all the railroad business of the state was, as original or connecting carriers, done by the eighteen complainants (Finding 1, Rec., 5305). Such business, both state and interstate, could only be done by the same property, trains, employes and facilities (Finding 2, Rec., 5305). By reason of geographical, railroad and business conditions, any state rate necessarily fixed the interstate rate, so that a reduction in a state rate necessarily caused a like reduction in the interstate, and the short line between any two points necessarily made the rate (Find-

ings 3, Rec., 5306.) The periods adopted by the court for showings of earnings were fair and approved by both parties (Findings 4, 17, Rec., 5307, 5315).

Second. The actual minimum value of all the C. B. & Q. property in Missouri was $53,172,907.83 (Finding 11, Rec., 5311, 5312). The part thereof devoted to the use of any class of state traffic was such sum as would equal such proportion thereof as the earnings therefrom bore to the sum total of all earnings in the state (Finding 16, Rec., 5315). Upon the value so ascertained complainant was entitled to an annual return of six per cent (Finding 12, Rec., 5312), or from the state freight business $409,325.04, and from the state passenger business $417,620.02 (Finding 19, Rec., 5324), or a total of $826,945.06, whereas the actual net return, without any allowance for the extra cost of doing state over interstate business, was (Finding 19, Rec., 5324) upon state freight $146,030.09, or 2.11 per cent, and upon state passenger $124,754.71, or 1.79 per cent; upon both, $270,784.80, less than two per cent, as against $826,945.06, the six per cent to which it was entitled.

Third. The earnings from the different classes of business were fixed, certain and exactly ascertainable (Finding 6, Rec., 5308.) So were the entire expenses incurred in the state (id.) The only difficulty was in dividing the expenses of any class of business as between state and interstate, as it was incurred in a common indivisible operation (id). An apportionment of expenses upon the basis of state and interstate revenue from any class of business fairly and justly represented the expense thereof (Finding 6, Rec., 5308-5309).

Fourth. It actually cost fifty per cent more, or $484,129.29, to do the state freight business, and twenty-five per cent, or $158,205, more to do the state passenger business than the interstate. This should be added to state expenses after its ascertainment

upon the revenue basis (Findings 8, 19, Rec., 5310, 5324.) When so done there was no return whatsoever upon the property of the C. B. & Q. but its state business was done at an actual loss. Without any extra cost, the return was less than two per cent.

Fifth. Practically the same result (Finding 19, Rec., 5317-5326) existed as to each of the other complainants, the details of which need not be followed as no other case has been appealed, the state thereby confessing that these rate laws are at least confiscatory as to seventeen out of the eighteen roads in the state.

15. Opinion Below.

Judge Smith McPherson, who tried the case below, delivered an elaborate opinion (Rec., 5275-5304, 168 Fed. Rep. 317), holding that:

(a) Injunction would lie to prevent the enforcement of confiscatory state rates (Rec., 5286-5288; 168 Fed. Rep. 317, 339, 340).

(b) The state laws, not purporting upon their face to apply to interstate rates, are not invalid because they as a matter of fact directly affect and cause to be reduced all interstate rates within the state (Rec., 5288-5292; 168 Fed. Rep. 317, 340-344).

(c) The penalty clauses of the state statutes were not void because they did not specifically provide for imprisonment (Rec., 5292-5293; 168 Fed. Rep. 317, 345, 346).

(d) The fact that the statutes applied to all the roads, yet fixed rates confessedly confiscatory as to two of them—St. L. & H. and K. C. C. & S., did not affect their validity as to any other complainant (Rec., 5293-5296; 168 Fed. Rep. 317, 346-348).

(e) Expenses of any class of business as between state and interstate should be divided in the proportion of the revenue from the class (Rec., 5296-5302; 168 Fed. Rep. 317, 333-332) and in addition thereto, allowance should be made for the extra cost of doing any class of the state business over the state (id.) by deducting same from the earnings of that class.

(f) The rates were confiscatory if the net result thus ascertained did not bring to complainant a return equalling six per cent per annum of the value of the portion of the property devoted to state use (Rec., 5301-5303; 168 Fed. Rep. 317, 354).

(g) While a court could not fix rates, yet if it could do so, it would fix a pasesnger rate of two and one-half cents for the stronger and three cents for the weaker roads (Rec., 5303-5304; 168 Fed. Rep. 317, 356).

16. Final Decree of March 8, 1909.

Upon the findings (Rec. 5305-5327) and opinion (Rec., 5285-5304), a final decree was entered (Rec., 5241-5243) to the effect: (a) The state rates so fixed by the acts of 1905 and 1907 were confiscatory and should not be enforced against complainant; (b) the Attorney General, Railroad Commissioners and other officials should not enforce against complainant the provisions in, or penalties for a violation of said acts, but if in the future circumstances should so change that the rates fixed should be compensatory, then such further orders would be made as would be just and proper in accordance with the precedent set in the Nebraska case (*Smyth* v. *Ames*, 169 U. S., 469, 42 L. Ed., 819, 850); (c) the shippers and passengers, defended by the Attorney General, should be dismissed without prejudice, with leave to complainant to bring them in by supplemental bill if they should attempt to enforce such statutes; and (d) the costs should be equally divided.

17. Complainants' Motion to Modify.

Complainants in each case filed a motion (Rec., 5244) afterwards amended (Rec., 5245-5246) to modify the opinion and decree by (a) changing the view upholding the penalty clause; (b) striking from the opinion the statement that the court would, if it could, fix the passenger rates upon some of the roads at two and a half cents per mile; (c) changing the decree so far as it taxed costs against complainant, and (d) modifying the decree as to shippers and passengers.

18. Supplemental Opinion.

In a supplemental opinion (Rec., 5327-5330; 168 Fed. Rep., 317, 356) in all of the cases, the court adhered to its ruling as to costs and the statement as to the passenger rate which the court would make if legislating, but held to be void the penalty clauses in the acts of 1907. It also modified its views to this extent: Since the Attorney General had actually agreed to a temporary injunction against the freight rates and had obtained the aid of the court in keeping in force for nearly two years the passenger rate, it was only fair to so frame the decree that the court could in the future enforce the same against efforts to evade or thwart it, a view with which the state court was in accord (*State ex rel.* v. *Williams*, 221 Mo., 227) when the evasion was attempted.

19. Amended Final Decree.

Thereupon an amended final decree (Rec., 5246-5249) was at the same term, and upon April 17, 1909, entered, changing the former one to the extent that: (a) The dismissal as to shippers and passengers was, as to the injunctive relief only, leaving them bound so far as concerned the establishment of the fact that the rates were confiscatory; as these parties expressly declined to appeal (Rec., 5249-5255) no question can arise as to

this modification; (b) modifying the order (Rec. 61) obtained by the state upon June 17, 1907, compelling the putting and keeping in effect until further order, the two cent fare, providing that it could be restored to the *statu quo* and under the direction and subject to future orders put into effect the rates which the former statutes authorized and which the court had ordered taken out. As to these modifications no complaint is made in any assignment of error (Rec., 5257-5264).

20. Appeal.

The defendants, other than the Attorney General and Railroad Commissioners, expressly declined (Rec., 5249-5255) to appeal. These officers, however, appealed (Rec., 5265-5268) the case of the C. B. & Q. only, leaving the decrees in the other seventeen cases in full force and effect, thereby practically confessing that the rates are confiscatory as to seventeen out of eighteen roads in the state, although fixed by general laws applicable to all. The petition for appeal (Rec., 5255) and assignment of errors (Rec., 5257-5264) are joint, not several, so that any error to exist must be joint, not several.

21. Assignment of Errors.

Thirty-two errors are assigned (Rec., 5257-5264) claiming the court below erred:

(a) In decreeing to be confiscatory the rates in question, and enjoining their enforcement (Assignments 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11) thus attempting to present the questions only whether the findings of facts justified the decree or whether there was any evidence to support it, without pointing out wherein there was any lack thereof.

(b) In enjoining the commissioners from enforcing the passenger rates (Assignment 12), a question never suggested

until the assignment was filed, and one not joint and common to all appellants.

(c) In permitting to be filed the amended and supplemental bill and overruling the demurrers thereto (Assignments 13, 14, 15, 16, 17) because the facts averred were not proper by way of supplement.

(d) In enjoining the present Attorney General from prosecuting in the state court suits instituted by his predecessor (Assignment 18), although the decree (Rec., 5247) does not mention any state court suit, and with his consent he was substituted for his predecessor, adopting his pleadings (Rec., 174).

(e) In finding that expenses, as between state and interstate business, should be divided in the proportion of revenue (Assignments 20, 21, 22, 24).

(f) In finding that it costs fifty per cent more to do the state freight, and twenty-five per cent more to do the state passenger business than to do the interstate (Assignments 19, 23, 25).

(g) In adopting in its findings the tables of earnings and expenses (Assignment 26) and stating therein that it was conceded that the railroads actually and honestly kept their books (Assignment 28).

(h) In finding, *in the opinion,* that a large number of men were discharged because of a reduction in rates (Assignment, 29), a fact not recited in the findings, and therefore not the subject of an assignment.

(i) In finding that the short line between two points necessarily fixed the rates (Assignment, 27).

(j) In not excluding from the valuation found, the value of the franchise (Assignments, 30, 31, 32), something (Rec., 5311, Finding11) not included therein.

The errors thus assigned were never presented within the thirty days fixed by the court (Rec., 5315, 5327, Findings, 7, 20) to call attention to any error, mistake or inaccuracy in its findings, but were filed (Rec., 5257) after the expiration of the term, i. e., on July 28, 1909, and after the failure to obtain the aid of the state courts (*State ex rel.* v. *Williams*, 221 Mo., 227), to evade the decree.

22. Cross Appeal.

(a) The C. B. & Q. took a cross appeal (Rec., 5334) assigning as error (Rec., 5335-5336) that the court should not have taxed any cost to it, and that the statutes were void for reasons other than that the rates were confiscatory.

(b) The cross appeal was taken as a matter of precaution, and because the questions are of a character which should be here determined. The court below entered its decree upon the sole ground that the rates were confiscatory. Of course this court can affirm, even if wrong reasons are given for a right result. The court below, however, reserved the power to dissolve the injunction if in the future changed conditions made the rates appear to be reasonable. It was, therefore, thought possible that the question of the validity of the statutes in other respects might not be considered in the absence of a cross appeal. To avoid such a contingency one was taken.

23. Evidence in the Case.

First. Some of the assignments of error in general terms challenge the sufficiency of the evidence to sustain the findings. It is almost an endless task to separate that portion thereof which relates only to the case under consideration and the assignments of error are so general that it is difficult to understand wherein it is claimed that the findings are unsupported.

Second. However, there is now made a general summary of some of the evidence so far as it relates to the case of the C. B. & Q., sufficient without further investigation to overwhelmingly sustain the findings.

1. *Correctness of the figures of the C. B. & Q.*

(a) The books, accounts and figures of the C. B. & Q. as to the rates fixed by the acts of 1907, were absolutely correct. (Oral evidence C. I. Sturgis, General Auditor, Rec., 4743-4762, 4773; Exhibits, 98-105, Rec., 5090-5105,) and admitted so to be. (Ev. Taliaferro, Rec., 4767-4763).

(b) Statements were made to the state's experts of these accounts and the books examined by them. Every courtesy was extended and every facility afforded. If expenses were as between state and interstate business to be divided upon the revenue basis, then the rates were clearly confiscatory (Cross examination of state's experts A. B. Taliaferro in C. B. & Q., Rec., 4767-4773; in St. L. & S. F. Case, Rec., 4556-4598).

(c) The auditor of the C. B. & Q. and the state's expert agree that if the freight rates of 1907 are confiscatory, those of 1905 must fall, and that those of 1907 have been properly ascertained (Sturgis, Rec., 4746; Taliaferro, Rec., 4772). This was not only testified to (Rec., 4566) but was at the trial actually conceded (Rec., 5308, Finding 4).

(d) Two experts from each side by consent (Rec., 5311, Finding 14; Order, Rec., 174) prepared for, and filed with the court, accurate statements (Rec., 175-212) from the books and records according to the theories presented by the parties. These show the same earnings, expenses, valuations and percentages as adopted in the findings (Rec., 5324).

(e) When the testimony was taken before the master relative to the freight rates under the act of 1905, the state had not

made investigation, as it subsequently did, yet the figures then produced were established (Ev. Sturgis, Rec., 229-356, 707-709, 1078-1133, with exhibits, particularly exhibit 42, Rec., 1448), and practically conceded by the state's expert (Ev. Fisher, Rec., 826-846) to be correct.

2. *Difference between the evidence before the master and before the court.*

When the evidence was taken before the master, the books and records of the railroad companies were subjected to much inspection and their custodians examined at great length in reference thereto (Ev. Sturgis, 229-425; 707-1078; C. B. & Q. Exhibits 1-49, Rec., 1227-1462; Ev. Johnson, Rec., 1543-1563, 1655-1690, 1714-1720, 1793, 2240-2272, 2279-2311, 2332-2335; Ev. Roth, Rec., 1564-1567, 1691-1713, 1721-1722, 1774, 1848-1851, 2312-2331, 2357-2359; Ev. Fisher, Rec., 1723-1728, 1733-1768; Missouri Pacific Exhibits 1-56; Ev. Tobin, Rec., 2583-2584, 2734-2825; Ev. Berger, Rec., 2585-2682; Ev. Maxwell, Rec., 2917-2935;Wabash Exhibits 1-32, Rec., 3324-3685). This was because the defendants had not made sufficient investigation to know the facts, and had not definitely adopted a theory. Upon the final trial, it appeared that statements had been served, the books examined and the correctness of the accounts of the railroad companies under the acts of 1907 were not only clearly proven, but by the state's experts either admitted to be correct, or not denied. (St. L. &. S. F. Case, Ev. Douglass, Rec., 3767-3814; Press, Rec., 4478-4479, 4638-4643; A. P. Taliaferro, Rec., 4554-4598; A. T. & S. F. Case, Conrad, Rec., 4448-4455; Peabody, Rec., 4404-4447, 4652-4662, 4683-4686; Taliaferro, Rec., 4670-4673; C. R. I. & P. Case, Frank Nay, Rec., 4687-4696; Taliaferro, Rec., 4697; K. C. S. Case, R. J. McCarty, Rec., 4698-4705; Taliaferro, Rec., 4706; St. L. & H. Case, Worland, Rec., 4707-4710; M. K. & T. Case, Seelig, Rec., 4713-4722; Taliaferro, Rec., 4722; K. C. C. & S. Case, Smith, Rec., 4725-4741; C. B. & Q. Case Stur-

gis, Rec., 4743-4762, 4773; Taliaferro, Rec., 4767-4773, 4774; C. G. W. Case, H. Ernst, Rec., 4776-4779.)

3. *Value of the property.*

(a) The parties admitted (Rec., 752, 4634) that the valuation by the State Board of Equalization of the C. B. & Q. property was one-third of its estimate of actual value of the property assessed by them. This did not include (Rec., 4634) a large amount of railroad property which is assessed locally (Rev. Sts. Mo., Sec. 9360, 9361) at two and a half or three times its value (Rec., 4634). The assessment locally in 1906 was (Rec., 1413) $530,440. The valuation of the C. B. & Q. by the state for 1908 (Ev. Sturgis, Exhibit 98, Rec., 4744, Ex. 98, Rec., 5102) was $53,172,907.83, a figure conceded by the four experts in their report (Rec., 202) to the court.

(b) The actual bonded indebtedness of the entire system of the C. B. & Q. was (Rec., 1383) $174,172,000, and stock $110,839,100, or a total of $285,011,100. Upon these bonds interest has always been paid, and eight per cent dividends (Rec., 4757) upon the stock. The earnings in Missouri are at least twenty per cent of all the earnings of the system (Ev. Fisher, Rec., 1001; Ev. Sturgis, 265), so that by a division upon a revenue basis there should, of stocks and bonds, be allotted to Missouri $57,002,200 more than the value found below.

(c) A new line of the C. B. & Q. was built in 1906 in Missouri from Old Monroe to Mexico, freed from any city terminals, the actual cash cost of which, without equipment or terminals averaged $45,867.05 per mile (Ev. Fisher, Rec., 842). The C. R. I. & P. had at the time of the trial just completed the construction between St. Louis and Kansas City of a road which actually cost from $50,000 to $70,000 per mile, exclusive of terminals (Ev. Nay, Rec., 4690, 4691, 4696). W. B. Doddridge, an expert of great experience, testified (Rec., 1578, 1579, 1605, 4463, 4468,

4490, 4491, 4668, 4780) that each railroad property in Missouri, excepting the St. L. & H. and K. C. C. & S. was of a value in excess of that estimated by the state board, and that a new road without terminals or equipment could not be built for $40,000 per mile. Detailed statements of all the railroad properties in the state (Rec., 5121-5240) were exhibited, with their assessed values admitted and proven to be at one-third of their value (Admission, Rec, 4634; Ev. Doddridge, Rec., 4780, 4781). Statements of earnings and expenses, mileage, bonded debt and capitalization of many of the roads (Ex. 1, Rec., 1230; Ex. 5b, Rec., 2386; Ex. 4, Rec., 3328; Ex. 2, Rec., 4790; Ex. 45, Rec., 4939; Ex. 78, Rec., 5028; Ex. 87, Rec., 5066; Ex. 89, Rec., 5065; Ex. 93, Rec., 5082; Ex. 98, Rec., 5090; Ex. 106, Rec., 5106) were exhibited, and were the subject of comparison with the C. B. & Q. which was the greatest earner per mile of all. The market value of the stock of one road was shown (Ev. Peabody, Rec., 5018, Exhibit 75). The state's expert refused (Rec., 4573, 4579) to say what, if any, valuation should be taken as the basis upon which rates should be allowed.

4. *Expenses as between state and interstate business should be divided upon the basis of revenue.*

The overwhelming weight of evidence was to this effect, persuasive reasons being given therefor.

(a) Johnson's exhibit 55, Missouri Pacific case (Rec., 2452) fortified by Sturgis' exhibit 41 (Rec., 1441) in the C. B. & Q. case, specifically gave reasons therfor.

(b) The auditors of all the roads adopted the method as correct. (St. L. & S. F. Ex. 2, Rec., 4790; A. T. & S. F. Ex. 45, Rec., 4939; C. R. I. & P. Ex. 78, Rec., 5026; K. C. S. Ex. 82, Rec., 5043; St. L. & H. Ex. 87, Rec., 5060; M. K. & T. Ex. 89, Rec., 5065; K. C. C. & S. Ex. 93, Rec., 5082; C. B. & Q. Ex. 98, Rec., 5090; C. & G. W. Ex. 106, Rec., 5106.)

(c) The best railway experts in the world favor it, giving many reasons for their views in addition to those set forth in the Missouri Pacific Exhibit 55 and Burlington Exhibit 41. Among these experts so testifying were Carl Gray, Vice President and General Manager of the Frisco (Ev. Frisco Case, Rec., 3929-3939, Cross Ex. Rec., 3940-4034); C. J. McPherson, Manager of the Missouri Pacific (Rec., 4288-4307); W. T. Tyler General Superintendent Frisco (Rec., 4099-4112); W. H. Whitenton, Superintendent Chicago, Rock Island & Pacific (Rec., 4140-4142); J. W. Kendrick, Vice President of the Santa Fe (Rec., 4390-4399); William Ellis, Commerce Counsel of C., M. & St. P. (Rec., 4194-4220); B. H. Bethard, General Manager, Missouri Pacific (Rec., 1821-1834); St. L. & S. F. Case (Rec., 4077-4092); W. B. Doddridge, Former General Manager Missouri Pacific (Rec., 1568-1629, 1647-1654, 1769, 2273, 3814-3823); D. C. Buell, Assistant to President of Frisco (Missouri Pacific Case (Rec., 1794-1799); W. C. Stith, General Traffic Manager of Missouri Pacific (Rec., 1465-1542, 1770-1773); C. I. Sturgis, General Auditor of the C., B. & Q. (Burlington Case, Rec., 229-425, 707-709, 1078-1133); Howard Elliott, President Northern Pacific (Rec., 426-492); George B. Harris, President C. B. & Q. (Rec., 536-554); Darius Miller, General Traffic Manager of C. B. & Q. (Rec., 605-618); George H. Crosby, Assistant General Manager of C. B. & Q. (Rec., 555-558, 846-847).

5. *To do the state business cost far more than to do the interstate, the extra cost being far in excess of the percentage fixed by the court.*

The following were the estimates of the railroad of extra cost of state business over interstate business, upon a revenue basis where not otherwise indicated, after the witnesses had been examined and cross-examined at great length:

Bethard, B. H., General Manager of the M. K. & T: Pas-

senger, 40 to 65 per cent (Frisco Case, Rec., 4078); freight, 4 or 5 times (Mo. Pac. Case, Rec., 1824).

Buell, D. C., Assistant to President, St. L. & S. F: freight, 3 times (Mo. Pac. Case, Rec., 1794-1799).

Clark, H. G., General Superintendent of Mo. Pac.: freight, 4 or 5 times on ton mile basis (Mo. Pac. Case, Rec., 1630-1631).

Crosby, Geo. H., Assistant General Traffic Manager, C. B. & Q.: freight, 3 to 5 times (Burlington case, Rec., 583).

Doddridge, W. B., former General Manager of Mo. Pac: freight, ton mile theory, 4 times (Frisco Case, Rec., 3822); freight, revenue theory, 2 times (Frisco Case, Rec., 3822); freight 3 to 6 times, 3 being minimum (Mo. Pac. Case, Rec., 1584-1595, 1596); passenger, 25 per cent (Frisco Case, Rec., 3827).

Elliott, Howard, President Nor. Pac: freight, 3 times (Burlington Case, Rec., 427, 484); 6 times on ton mile basis (id).

Ellis, Wm., Commerce Counsel, C. M. & St. P.: Passenger, 50 per cent very low (Frisco Case, Rec., 4196); freight, a great deal more than 300 per cent (Frisco Case, Rec., 4197).

Eustis, P. S., General Passenger Agent, C. B. & Q: Passenger, 50 per cent (Frisco Case, Rec., 4368).

Fisher, W. T., Head of weighing and inspection dept., Mo. Pac.: Freight, 2 to 6 times (Mo. Pac. Case, Rec., 1753).

Gray, Carl, Vice-president and General Manager, St. L. & S. F.: Passenger, 20 to 30 per cent (Frisco Case, Rec., 3939): freight, 3 to 5 times (Frisco Case, Rec., 3931).

Gray, Henry, Comptroller of the Northern Pacific: freight, 7 to 11½ times on ton mile basis (Burlington Case, Rec., 620.)

Harris, Geo. B., President, C. B. & Q.: freight, 3 to 5 times as much (Burlington Case, Rec., 540).

Kendrick, J. W., Vice-president A., T. & S. F.: passenger, 30 to 100 per cent (Frisco Case, Rec., 4399).

Kimbell, R. E., Assistant General Auditor, St. L. S. W. Ry. Co. (Frisco Case, Rec., 4177); freight, by actual test, from 3 to 4 times (id. Exhibit 6, Rec., 4821).

Miller, Darius, Traffic Manager, C. B. & Q.: freight, 3 times, conservatively (Burlington Case, Rec., 607).

Miller, Henry, General Manager, Wabash: freight, 2 or 3 times, ton mile basis (Wabash Case, Rec., 2829).

McPherson, C. J., Assistant General Manager, Missouri Pacific: freight, several times (Frisco Case, Rec., 4300); passenger, more than 25 per cent (Frisco Case, Rec., 4307).

Peabody, James, Accountant, A. T. & S. F.: by actual test, freight over 3 times, passenger, 47.2 per cent (Frisco Case, Rec., 4408).

Rainey, S. L., Assistant to General Manager, St. L. & S. F.: freight, 3 or 4 times (Mo. Pac. Case, Rec., 1837).

Rawn, I. G., General Manager, Ill. Cent: freight, 3½ times on ton mile basis (Burlington Case, Rec., 572).

Stith, W. C., Traffic Manager, Mo. Pac: 2½ times for freight (Mo. Pac. Case, Rec., 1496).

Stuart, J. S., General Manager, Erie R. R.: freight, 5 to 8 times, ton mile basis (Burlington Case, Rec., 691).

Sturgis, C. I., General Auditor, C. B. & Q.: freight 3 to 7 times (Burlington Case, Rec., 245-246-397).

Tyler, W. T., General Superintendent, St. L. & S. F.: freight 3 to 5 times (Frisco Case, Rec., 4101); passenger, 35 to 40 per cent (Frisco Case, Rec., id).

Whittenton, W. M., General Superintendent, C. R. I. & P.: freight 3 to 6 times (Rec., 4142; passenger, 25 to 50 per cent (Frisco Case, Rec., 4140).

Williard, Daniel, General Manager, C. B. & Q.: freight 3 times, ton mile basis (Burlington Case, Rec., 494, 535).

The fact that some of the estimates of extra cost are upon the ton mile basis is no indication that the witness thought the equal division of expenses should be upon that basis. Howard Elliott (Burlington Case, Rec., 484) and W. B. Doddridge (Frisco Case, Rec., 3822) pointed out that it came to the same end, the total expense being that ascertained upon an equal basis plus the extra cost. If the ton mile theory be adopted the latter should be ascertained by using a higher multiple than would be used upon a revenue basis. The total expense is the sum total of the two.

6. *The return from the entire property was insufficient.*

The total earnings in Missouri from every source, for the year ending June 30, 1908, were shown by the auditor of the C. B. & Q. (Ev. Sturgis, Rec., 4747; Exhibit 98, Rec., 5091) in detail to be $12,317,122.00, while the expenses (id.) were $10,301,534.53, making the net income $2,015,587.47. The state's expert admitted these figures (Ev. Taliaferro, Rec., 4767-4773) to be correct. The totals produced by him in his statement (Exhibits 103, 104, Rec., 5101, 5102) and those made (Rec., 201-206) by the four experts appointed by the court (Rec., 174) were all upon the same basis and adopted the same figures. These figures were adopted as part of finding 18 (Rec., 5315-5317). The value of all the property in Missouri (Rec., 5311, Finding 11) was $53,172,907.83. Upon this sum the railroad company was entitled to receive a net return of six per cent or $3,190,374.46. It actually received $2,015,587.47, or only 3.7 per cent, a deficit of $1,174,786.99 or 2.3 per cent. The state conceded (Ev. Taliaferro, Rec., 4593) that it cost more to do the state than the interstate business. It manifestly follows that if the rates are confiscatory as a whole, the state part is also, as that part of the business is more expensive than the remainder . The acts of the legislature in question account for the loss. They directly reduced the state freight earnings $112,533.71 (Finding 19,

Rec., 5324), interstate (Ev. Sturgis, Rec., 4746) $477,647.79, state passenger (Finding 14, Rec., 5313) $394,878.77 and interstate $261,556.41, a total of $1,246,616.68, or more than 2.3 per cent upon the valuation of the entire property, $53,172,907.83 (Finding 11, Rec., 5311).

7. *The freight rates were unreasonable and unjust, irrespective of general confiscation, and not fair compared with those of other states.*

These facts were overwhelmingly proven (Ev. Stith, Rec., 1543-1563; 1770-1773; Crosby, Rec., 555-558, 578-604, 846-847; Darius Miller, Rec., 605-618.) No more unfair statement of the evidence could have been made than that retailed by the Attorney General to the Governor (Appendix 9) and by the latter forwarded to the legislature.

8. *The state rates in question directly affected interstate rates.*

Finding 3 (Rec., 5306-5307) explicitly states that the state rates in question had the direct effect of reducing all interstate rates. The unanswerable views of Robert Mather (Exhibit 4, Rec., 4806-4820) were proven (Ev. Haile, Rec., 4035-4076) to be sound. The testimony of the witnesses (Ev. Haile, Rec., 4035-4076; W. C. Stith, Rec., 1543-1563, 1770-1773; Geo. H. Crosby, Rec., 555-558, 578-604, 846-847; Darius Miller, Rec., 605-618; Bethard, Rec., 4077-4098; Kendrick, Rec., 4390-4403) made it impossible for the court below to find the fact other than it did.

9. *The two cent fare did not increase travel.*

This was demonstrated with great accuracy by one who kept statistics (Ev. Nay, Rec., 4456-4474; Exhibits 48-56, Rec., 4960-4970) and the fact found below (Finding 10, Rec., 5310-5311.)

10. *Opinion of Judge Philips upon application for an injunction in* 1905.

Through oversight this does not appear in the record but will be printed as part of the appendix hereto (Appendix No. 8).

11. *Report of the Attorney General in* 1907.

The report of the then Attorney General, transmitted by the Governor to the legislature, is attached hereto as Appendix 9. It urged the repeal of the Act of 1905, and the evasion of the jurisdiction of the federal courts.

12. *Questions to be considered.*

Such being the case and the state of the record, we proceed to a consideration of the questions involved so far as they can be gathered from the assignment of errors and the conduct of the trial below. We have not yet had the benefit of the views of the state, hence, must deal with the situation in a more general aspect than would have been the case had we, before the preparation hereof, seen the brief of the other side. The questions herein and the order in which they will be considered are:

(a) The laws fixing the rates sought to be enjoined, and the questions arising in reference thereto (Infra, Division I).

(b) The effect to be here given to the finding of fact that the rates were confiscatory (Infra, Division II).

(c) Whether determined from the findings of fact or from the evidence, the rates are confiscatory (Infra, Division III).

(d) In determining whether the rates were confiscatory, it is immaterial whether the railroad would or could make up its losses by charging more or less to other traffic (Infra, Division IV).

(e) The decision below was in any event right because the

laws under which the rates were imposed are invalid, they directly affecting interstate commerce, and being discriminatory (Infra, Division V).

(f) There was the right to continue the litigation by bills filed against the rates fixed by the acts of 1907, whether the new pleading be considered an original or supplementary bill (Infra, Division VI).

(g) If the rates were confiscatory or the laws invalid, there was the right to enjoin (Infra, Division VII).

(h) The railroad commissioners have no cause for complaint because they were enjoined from enforcing the passenger rate act (Infra, Division VIII).

(i) One-half the costs were improperly assessed against the railroad company (Infra, Division IX).

BRIEF OF ARGUMENT FOR C. B. & Q. R. CO.

I.

Laws under which the rates were sought to be enjoined and the questions arising in reference thereto.

1. Laws Prior to 1905.

The general laws of Missouri (Rev. Sts., 1899, Art. 4, chap. 12) as amended (Laws Mo., 1903, p. 132, Rec., 5-6), hereinafter set forth as Appendix 1, gave the Railroad Commissioners full power to fix, modify and reduce all state freight railroad rates. All rates in existence thereafter were prior to 1905 in existence and established by the acquiescence of the Commissioners.

2. Freight Act of 1905 Challenged by the Original Bill.

(a) In 1905, there was adopted a maximum state freight carload rate act (Laws, Mo., 1905, p. 102, Rec., 6-7) hereinafter set forth as Appendix 2.

(b) Not only the penalty clause, but the whole act, was clearly void, because it only applied the penalty (Sec. 1194a) to a "railroad company," whereas the rates fixed (Sec. 1194) applied to any "individual, company or corporation owning, operating or managing a railroad." This was such a clear discrimination as to destroy the act. In *L. & N. R. Co.* v. *R. Com.*, 19 Fed. Rep., 679, 695, the same question was presented, and Judge Baxter said:

> "Another and like invidious discrimination is contained in section 13. This section makes it the duty of the com-

missioners to 'consider and carefully revise all the tariffs of charges for transportation of any person or corporation owning or operating a railroad in this state,' and if, in their judgment, 'any such charge is more than just and reasonable compensation for the service for which it is proposed to be made, or if any such charge amounts to unjust and unreasonable discrimination against any person, locality or corporation,' the commissioners are to 'notify the person or corporatin of the changes necessary to reduce the rate to a just and reasonable compensation, and to avoid an unjust and unreasonable discrimination;' and 'when such changes are made' or 'when none are deemed proper and expedient, the commissioners are to append a certificate of approval to such tariff of charges, and in case such change' suggested by the commission 'shall not be made,' or if 'any charge, subsequently made, shall not conform thereto,' said '*corporation* shall be held *prima facie* guilty of extortion.' It is *corporations*, and not persons operating railroads, who are to be held *prima facie* guilty of extortion under this section, and it is corporations, and corporations *only*, who can be punished under its provisions, and thus it appears the act is, in its severest features, more exacting and oppressive of corporations than of persons operating railroads, the former being subjected to penalties and to punishment from which the latter are exempt."

Below, upon the first hearing, in an opinion a copy of which appears as Appendix 8, Judge Philips said:

"For instance, right on the face of this act of the legislature there is a question raised here that the act is leveled against all individuals and corporations who may carry these articles affected by this act. When it comes to the section of the statute that authorizes the shipper to maintain an action and treble damages, it applies only to railroad companies and not to individuals who may be running a railroad, and therefore the contention is that on the face of the statute it is discriminatory. It discriminates against the railroad company in this respect by subjecting it to this liability when it does not subject an individual who may own a railroad and be carrying goods as a railroad to the same liability. Now there are two answers made to that in argument. One is that the bill does not aver on its face that there are individuals who are operating railroads in the state and who would be common carriers; and in the second place, that although the section of the statute referred to which subjects the railroads to treble

damages at the suit of any shipper applies only to railroad companies, that it is not infrequently the case that an act or a statute may be void in part and good in part, that the vicious part of it may be eliminated and that which is good may stand. It seems to me that if this objection to the statute is well taken, that that section discriminates against the railroad company and in favor of an individual carrier. The principle or rule invoked about the statute being good in part and bad in part does not apply to this sort of a case. The objection to this statute is that it discriminates. It subjects only one class of citizens to a liability and to a penalty without subjecting another citizen engaged in the same line of business and doing the same acts to the same sort of penalty, and therefore it is a discrimination on its face against one citizen and in favor of another, and all such statutes certainly run counter to the provisions of the fourteenth amendment because they are unequal in their provisions. Whether the facts that have been developed that there are no individuals in this state running railroads or performing the functions of a common carrier in this state, would have any effect on that statute is not necessary to be considered now, but as stated by the court at the hearing, it would seem to me that for the purpose of this preliminary hearing, the legislature which made the statute having mentioned individuals, the presumption ought to be directed to the legislative declaration that there are such individuals subject to the provisions of the statute, otherwise they would not have been enumerated by the legislature. If it is a legislative declaration that there was an interest to legislate with respect to individuals operating railroads who then owned them or who might hereafter operate railroads, it is not necessary to go further into a discussion of that matter."

(c) The act of 1905 was, however, repealed by that of 1907 (Laws, Mo., p. 171; Amended Bill, Rec., 64-66), hereinafter set out as Appendix 3. The judge below (Rec., 5286) said:

"In 1907 the legislature of the state repealed the statute of 1905 and enacted a substitute therefor, which act was to take effect in June, 1907."

It was, however, claimed below by the state that under the act, penalties accruing thereunder remained in force because section 1194b thereof provided that no penalties accrued or liabilities created should be affected by the repeal. This carried out the

suggestion of the Attorney General (Appendix 9) that the new law "would not affect the litigation now pending." However this might be, the enforcement of penalties was enjoined at a time when the confiscatory nature of the rate was not denied, so no penalties could accrue when there was an injunction against the enforcement of the rates to enforce which the penalties were imposed. Any other view would nullify the doctrine of *Ex Parte Young*, 209 U. S., 123, 52 L. Ed., 714, and *Wilcox* v. *Consolidated Gas Co.*, 212 U. S., 19, 53 L. Ed., 382. The result is, therefore, that the entire act of 1905 is repealed and defendants were wrong in insisting upon the right to enforce its penalties (*Dinsmore* v. *Southern Express Co.*, 183 U. S., 115, 120, 121, 46 L. Ed., 111). Whether or not technically there was a full and complete repeal of every part of the act of 1905, the legislature of 1907 did, in view of the pending litigation, effectually determine the cases for the railroads accomplishing "the result they wished." So it has been expressly decided (*Dinsmore* v. *Express Co.*, 183 U. S., 115, 121, 46 L. Ed., 11, 113).

(d) It was conceded below (Ev. Taliaferro, Rec., 4566; Peabody, 4409) that if the freight rates fixed by the act of 1907 were confiscatory, then those fixed by the act of 1905 must fall because the latter were lower. The trial judge (Rec., 5308, Finding 4), as to a concession at the trial, said:

> "The freight rate statute of 1907 as to commodities mentioned allowed greater rates than did the statute of 1905 assailed by the original bills of complaint herein, and it was conceded at the trial that if the rates fixed by the act of 1907 were confiscatory, that those fixed by the act of 1905 were likewise."

The decree (Rec., 5246-5247) found the rates fixed by the act to be in fact confiscatory.

(e) The act of 1905 is also void for the reasons asserted by the cross appeal to be hereafter presented, i. e., because it directly

affected interstate commerce, and because being confessedly confiscatory as to seventeen of the roads, it would be discriminatory to uphold it as to the eighteenth.

(f) The Governor when he reluctantly approved (Rec., 2450-2451) the act, practically admitted that it was passed without investigation and invited a legal test of the rates by adding:

> "That there should be a re-adjustment of freight rates in this state there can be no question. It is a matter that must be fought out sooner or later. This measure is at least a step in the direction of the solution of the question for the courts can, if the contention that the rates are unreasonable is insisted upon, after hearing all the evidence and examining into all the facts that are not available, to the Executive, decide upon the reasonableness of the rates, the results of which proceedings would be that the public would be advised as to what rates are reasonable, and the Railroad Commissioners or the next General Assembly can equalize such inequalities of this measure as may be found to exist, if any, and fix such rates as under the law, *announced by the courts,* are right and just to the railroads and to the people."

In his general message in 1907 (Rec., 2450) he thus urged an amendment to the act of 1905:

> "The Forty-third General Assembly enacted a maximum freight law reducing freight rates on all railroads of the state. The federal courts have enjoined the Railroad Commissioners and state officials from enforcing this law until its validity can be determined. The case is now pending in the United States Court at Kansas City. Much testimony has been taken in the case, and I have requested the Attorney General to prepare for your information the salient features developed by the evidence, in order that you may be fully advised in thepremises. In my opinion the present law should be amended so as to make the penalty for its violation apply to persons, corporations and partnerships. The present penalty clause applies only to railroads. It should also be amended so as to include coal, lumber and other products."

Afterwards he sent a special message (Rec., 2449-2450), thus urging change in the old law:

"The Forty-third General Assembly enacted a maximum freight law, reducing freight rates on the railroads in this state. There can be no doubt that freight rates in this state are entirely too high as compared with states similarly situated. No maximum rate law had been enacted for many years, and it is but natural that in the endeavor to fix rates upon a reasonable basis some inaccuracies should have crept in. Taking advantage of the seeming defects of this measure, the railroads have enjoined through the federal courts the Railroad Commissioners and the state officials from enforcing this law until its validity can be determined. This case is now pending in the United States District Court at Kansas City. It would be unfortunate if this General Assembly should adjourn without enacting a statute curing the faults in this freight rate law. The people of the state are entitled to and should receive the benefit of the reduced freight rates which they have not yet had the advantage of by reason of this statute being inoperative through the courts. The statute enacted by the last General Assembly is defective in the penalty clause, which applies only to railroads. The penalty should be made to apply to persons, corporations and partnerships. The cattle clause should be corrected in the light of the testimony adduced in the freight rate litigation so as to fix these rates at an amount that will stand the test of the judicial crucible. With these corrections I believe the people of Missouri will soon be enjoying the reduction of freight rates given by the law and of which they are now deprived."

It is scarcely conceivable under these circumstances that the act of 1905 has any validity. It surely has answered its purpose (*Dinsmore* v. *Express Co.*, 183 U. S., 115, 46 L. Ed., 111). A letter of the Attorney General to the Governor, transmitted by the latter to the legislature, and submitted herewith as Appendix 9, was equally insistent upon a repeal, but at the same time this officer insisted that the pending litigation as to the old act would be continued, upon this subject, saying:

"It is, therefore, my opinion that there should be adopted by this legislature a new maximum freight rate law which would make such changes in the live stock rate of the act of 1905, as would relieve the bill from any question of legality on account of the low rate upon live stock fixed by the

act of 1905; that the penalty clause of the bill should be changed; that maximum rate should be established upon the articles enumerated in Class J., and that such modifications should be made in the rates fixed by the act of 1905, upon those commodities, other than live stock, which might in the opinion of the legislature, assisted by the experts employed by the state in this litigation, seem advisable. *The enactment of a law making these changes in the act of* 1905, *would not affect the litigation now pending*, unless the railroad companies would by reason of such new enactment decide to abandon the litigation."

3. Freight Acts of 1907.

(a) So urged by the Attorney General and Governor, the legislature of 1907, passed (Laws Mo., 1907, p. 171; Amended Bill, Rec., 64-66) an act, a copy of which is attached hereto as Appendix 3. Stone was added, that having been provided for in 1905 by a separate act (Laws Mo., 1905, p. 104, Rec., 62). This new act raised the rates upon live stock which was mainly carried by the C. B. & Q., in the case of which the evidence had been taken, leaving the other rates unchanged other than a decrease of the rates as to commodities like coal, ore, stone and timber commonly carried by the lines in other parts of the state. A comparison of the two laws so shows. Thus, under the laws of 1907, the live stock rate was raised from $6 to $8 per carload for the first 25 miles, and from $3 to $4 per carload for the second 25 miles; the stone and like commodity rate was reduced from 20 cents per ton per car for the second ten miles and 5 cents per ton for each additional ten miles, to 5 cents per ton per carload each ten miles over the first ten. At the same time an act was passed fixing the rates upon carloads of fruit (Laws Mo., 1907, p. 187, Rec., 66-67) a copy of which is attached hereto as Appendix 4. Still another act (Laws Mo., 1907, Rec., 67) hereafter copied as Appendix 5 hereto, was passed requiring the shippers of all carload lots to be carried free. This latter act needs no special consideration,

as the state court has since declared it void (*McCully* v. *R. Co.*, 212 Mo., 1) because it required the railroad to render a service without compensation.

(b) The annual reduction of state freight earnings under the act of 1905 was (Rec., 238) $171,122.07. Under the act of 1907 the reduction, exclusive of fruits and stone, was (Finding 19, Rec., 5324; Ev. Sturgis, Rec., 4746, 5098) at least $112,533.71. As the state rate necessarily fixed the interstate (Finding 3, Rec., 5306-5307) the annual reduction in the interstate earnings from the same commodities was enormous, aggregating (Ev. Sturgis, Rec., 4746, 5098, Exhibit 101) $477,647.79 under the act of 1907, and $700,487.29 under the act of 1905. The acts of 1907 in conjunction with that of 1905 became the subject of a supplemental bill (Rec., 61-73) as the state, when asking for the legislation, necessarily conceded must be the case, for the Attorney General's report, submitted by the Governor (Appendix 9) said:

> "The enactment of a law making these changes in the act of 1905, *would not affect the legislation now pending*, unless the railroad companies would by reason of such new enactment decide to abandon the litigation."

(c) The act of 1907 was drastic in its penal provisions for section 1194a provided for a fixed fine of $5000. A failure to pay same resulted in imprisonment because the general law (Rev. Sts., Mo., 1899, Sec. 2680) provided:

> "Whenever any defendant shall, on a conviction, be sentenced to imprisonment in a county jail, or to pay a fine, he shall be imprisoned until the sentence is fully complied with and all costs paid unless he be sooner discharged in the manner hereinafter provided."

If two C. B. & Q. freight trains of twenty cars each ran each day, the daily fines would aggregate $200,000, or $73,000,000 per year, more than the value of the entire property in the state, found to be (Finding 11, Rec., 5311) $53,172,907.83. It is not

strange then that the temporary injunction as to this act was issued by consent, as in finding 6 (Rec., 5308) thus recited:

> "By agreement of both sides in open court in June, 1907, this court issued a temporary writ of injunction against the enforcement of the freight rate statute."

(d) The court below upon the facts found the rates fixed by these acts to be confiscatory (Decree, Rec., 5241). This, too, after giving the state the benefit of all the other state freight rates, as it contended it was entitled to under *M. & St. L. R. Co.* v. *Minnesota*, 186 U. S., 257, 267, 46 L. Ed., 1151, 1157. That this was to the advantage of the state was recently decided by Judge Hook (*M. K. & T. R. Co.* v. *Love*, 177 Fed. Rep., 493, 502, 503) he saying:

> "It is also urged that the bills of complaint are defective because they do not assail the freight rates separately. But the bills disclose the contrary, at least by express general allegations. Moreover, the rates in question should properly be considered as a body and in connection with the other freight rates of the companies not affected by the orders. Though the orders, save the year 1908, the rates prescribed constitute as much a single body as if embraced in one order. They affect from forty to fifty per cent of the local freight business, and cause an average reduction of about forty per cent of the prior rates applied to the same amount of traffic. Presumably the commission preserved a due relation among them so far as is practicable in such cases, and there is no contention that the rates left untouched are relatively as low. When all the local freight earnings are considered an insufficient net return is clearly disclosed, and there is no difficulty in locating the cause."

It is immaterial whether gains or losses were or might have been made upon business other than that of the general class upon which the rates in question were fixed (*Smyth* v. *Ames*, 169 U. S., 517, 541, 42 L. Ed., 819, 847; *Central R. Co.* v. *Northampton Co.*, 11 Northampton Co. Ct. Rep., 342). That view was taken below (Opinion, Rec., 5301-5302). However, if all business, state

and interstate, be considered, there is, as hereafter shown, not a sufficient return in Missouri. Of course if the rates are confiscatory the enforcement thereof was properly enjoined. Such is now the settled law. (*Smyth* v. *Ames*, 169 U. S., 466, 42 L. Ed., 819; *Ex Parte Young*, 209 U. S., 123, 52 L. Ed., 714; *Hunter* v. *Wood*, 209 U. S., 205, 52 L. Ed., 747; *Prentis* v. *Atlantic Coast Line*, 211 U. S., 210, 53 L. Ed., 150; *Wilcox* v. *Consolidated Gas Co.*, 212 U. S., 19, 53 L. Ed., 382; *A. T. & S. F. R. Co.* v. *Love*, 174 Fed. Rep., 591; *M. K. & T. R. Co.* v. *Love*, 177 Fed. Rep., 493.) The question of confiscation will hereafter be considered.

(e) Upon the cross appeal it is contended that the acts of 1907 must fall, because they directly affect interstate commerce, and because being confessedly confiscatory as to seventeen roads, they cannot be upheld as to the eighteenth. These questions will be hereafter considered.

4. The Passenger Act of 1907.

(a) Prior to 1907 the provisions as to passenger fares (Rev. Sts., Mo., 1899, Secs. 1191, 1192) copied as Appendix 6 attached hereto, fixed three cents as the rate.

(b) In 1907, a two cent passenger rate law, copied as Appendix 7 hereto, was passed (Laws Mo., 1907, p. 170; Amended Bill, Rec., 69-70). This and the freight acts took effect upon the same day (Bill, Rec., 63, 66, 69; Answers, Rec., 96, 97, 103, 104; Const. Art. 4, Sec. 36) and were made the subject of a new bill. The actual yearly reduction thereby of the state passenger earnings was (Finding 14, Rec. 5313) $394,878.77. It forced a reduction of the interstate fares, causing (id.) a yearly loss therein of $261,556.41. So, while the freight act of 1907 increased the state earnings $58,588.36 over the 1905 act, yet this was much more than overcome by the state passenger reduction. The court

refused (Finding 6, Rec., 5300) a temporary injunction as to the passenger rate pending a test, and kept it in force about two years. The penalty provision was quite severe, section 1192a providing for a maximum fine of $500 and a minimum of $100. The C. B. & Q. in one year carried (Ev. Eustis, Rec., 4376) 2,695,898 state passengers. Minimum fines of $100 would have aggregated in one year $269,589,800, several times the value of all the property within the state. After the decision of *Ex Parte Young*, 209 U. S., 123, 52 L. Ed., 714, it became plain that there should have been a temporary injunction. Before that the fear of penalties prevented a violation of the statute.

(c) The trial court upon all the evidence at final hearing, found the rate to be clearly confiscatory. This, of course, entitled complainant to be relieved therefrom by injunction. (*Smyth* v. *Ames*, 169 U. S., 466, 42 L. Ed., 819; *Ex Parte Young*, 209 U. S., 123, 52 L. Ed., 714; *Hunter* v. *Wood*, 209 U. S., 205, 52 L. Ed., 747; *Prentis* v. *Atlantic Coast Line*, 211 U. S., 210, 53 L. Ed., 150; *Wilcox* v. *Consolidated Gas Co.*, 212 U. S., 19, 53 L. Ed., 382; *A. T. & S. F. R. Co.* v *Love*, 174 Fed. Rep., 59; *M. K. & T. R. Co.* v. *Love*, 177 Fed. Rep., 493). That phase of the case will be hereafter considered. Such a result was foreshadowed by Mr. Justice Hughes, when, as Governor of New York, he vetoed a two cent fare law, among other things saying:

> "The bill represents a policy seriously mistaken and pregnant with disaster. It is of the utmost importance that the management of our railroad corporations should be subject to strict supervision by the state and that regulations compelling the observance of the law and proper and adequate service should be rigidly enforced. It is the duty of these corporations to provide transportation of passengers and goods at reasonable rates, and the state should compel the performance of this obligation. But injustice on the part of railroad corporations toward the public does not justify injustice on the part of the state toward the railroad corporations. The action of the government should be fair and impartial, and upon this every citizen, whatever his interest,

is entitled to insist. We shall make matters not better, but worse, if to cure one wrong we establish another. The fact that those in control of railroad corporations have been guilty of grossly improper financiering and of illegal and injurious discriminations in charges points clearly to the necessity of effective state action, but does not require or warrant arbitrary reprisals. In dealing with these questions, democracy must demonstrate its capacity to act upon deliberation and to deal justly. It is of the greatest importance not only that railroad corporations should be compelled to respect their public obligations, but also that they should be permitted to operate under conditions which will give a fair return for their service. Upon this depends not simply the security of investors but the security of their employees and the protection of every form of industry and commerce through the maintenance and extension of necessary transportation facilities. Nothing could be more opposed to the interests of the community as a whole than to cripple transportation corporations by arbitrary reduction of earnings. It may be said that a two cent passenger rate is not so extreme as to have a very injurious result. But this is a debatable question. Large and prosperous suburban communities have been built up through the offer of commutation rates much less than the proposed maximum. Upon the maintenance of these rates many thousands of our citizens rely. Considerable differences exist between the railroad corporations with respect to the territory they serve and the cost of service, and it is manifest that what would be fair for one might be far from fair for another.

"An arbitrary dislocation of tariffs by the fiat of the legislature without investigation is a matter of serious concern. The best that could be said for such legislation would be that it should be regarded as an isolated case and not as a precedent. For if flat freight rates, either for all commodities or for different kinds of commodities, were similarly to be fixed by the legislature without investigation or proper ascertainment of their justice, our railroad business and our industrial and commercial interests would be thrown into confusion. I do not mean to be understood as saying that a maximum two cent passenger rate would be unreasonably low. It might be high enough in many cases. Possibly it would be high enough in all cases. I fully appreciate the fact that those who have promoted this bill believe that such a rate would be fair. But I deem it most important that the policy of dealing with matters of this sort arbitrarily by legis-

lative rule of general application without reference to the demands of justice in particular cases should be condemned. Every workingman, every tradesman and every citizen believing himself to have right at stake in the prosperity of the country should determinedly oppose it. For it not only threatens the stability of business enterprises which makes our prosperity possible, but substitutes unreason for sound judgment, the ill considered demands of resentment for the spirit of fair play and makes impossible patient and honorable effort to correct abuses.

"There is a better way. It has already been pointed out in the legislature of this state. It is practically impossible in view of the nature of the problems and the many questions requiring consideration for the legislature to deal directly with railroad rates in a satisfactory manner. Where a matter requires investigation in order that a just result may be obtained, the obvious course is to create a body which can investigate with expert assistance as summarily as possible and which shall have adequate power to make appropriate orders. Such a body has been created in this state through the Public Service Commissions law, recently enacted. Provision is made for inquiry into matters of freight rates and passenger fares and for the fixing of such rates as shall be found just and reasonable. If a passenger rate of two cents a mile is just and reasonable, it can be fixed. If it is not just and reasonable, it should not be fixed. It will be said that this requires time and investigation. But it will not require any longer time or any more protracted investigation than is necessary to reach a right result. The interests of the country are so great and our individual interests are so closely interwoven that it is to the highest degree dangerous to give encouragement to the spirit of impatience with the orderly process of inquiry. It may be said that many other states have adopted similar legislation. If the principle of that legislation is sound we could readily follow the precedent, but if it is unsound, there is the greater reason why it should not be followed. The state of New York has provided machinery to settle these questions justly to all with as much dispatch as possible. It is to the interest of all that this machinery should be made as perfect and effective as possible. It is to the interest of none that it should be discarded because of preference for arbitrary legislative action. If this bill were to become a law, it would most probably lead in many cases, on account of pretended or real necessity, to economies in service and to readjustment of rates now lower to the annoyance and injury of considerable

numbers of the traveling public, for which the gain to others would not necessarily compensate. Again the validity of such a statute would almost certainly be contested in protracted litigation, the result of which to say the least, would be in doubt. At a critical time, when the interests of all demand that reason and judgment should control in dealing with such matters, we should have abandoned our true line of action and facilitated still wider departures."

The Pennsylvania (*Pennsylvania R. Co.* v. *Philadelphia Co.*, 220 Pa., 100, 68 Atl. Rep., 676; *Central R. Co.* v. *Northampton Co.*, 11 Northampton Co. Ct. Rep., 342), Arkansas (*In Re Arkansas Rates*, 163 Fed. Rep., 141), and Oklahoma (*A. T. & S. F. R. Co.* v. *Love*, 174 Fed. Rep., 591; 177 Fed. Rep., 493) two cent fare laws have been enjoined. That rate was condemned by the Wisconsin Railroad Commission (*Buell* v. *C. M. & St. P. R. Co.*, Fed., 1907). There ought not, therefore, to be any doubt about a similar rate in a western state. However, upon the proofs and findings there is not a shadow of doubt, not even a basis for an argument in favor of the rate.

(d) Upon the cross appeal the validity of the passenger rate is also assailed, because the act of fixing it directly affects interstate rates, and being confessedly invalid as to seventeen of the roads, it cannot without discrimination be applied to the eighteenth. Besides this, its non-application to roads 45 miles or less long makes it discriminatory. These questions will be hereafter considered.

II.

The effect of the finding below that the rates were clearly confiscatory.

The court below found the rates to be confiscatory. This finding was made from 5027 printed pages of evidence not only specifically applicable to complainant, but also to other roads tra-

versing the same territory. In the light of the peculiar circumstances surrounding the case, great weight should be given to the finding. Especially is this true in view of the extended inquiry of the experts, their long cross examinations and the reasons given for their methods of dividing expenses and determination that it cost more to do the state than the interstate business.

(1) OPPORTUNITIES OF THE STATE TO OBTAIN THE FACTS.

Finding 4 (Rec., 5307) recites:

> "Pending this litigation each of the complainant companies made and delivered to defendants statements showing the earnings and expenses for certain periods, which statements have been taken by both sides as sufficiently illustrative of the situation for the determination of these cases. The companies extended to the state officers, defendants herein, acting by experts by them selected, the opportunity to examine the statements and the books, papers, vouchers, and records of the companies."

Finding 5 (Rec., 5308) recites:

> "The parties were producing evidence and preparing their evidence for about one year with the aid of experts on each side. These experts were all men of high character and great proficiency as railroad accountants. The experts on each side were given *the fullest opportunity and all the time desired* to obtain the information and put the same in form in exhibits, schedules and reports, all of which are in evidence in the cases, supplemented by the oral testimony of each of the experts with reference to all of these things."

A. P. Taliaferro (Rec., 4557-4558) chief expert for the state, testified:

> "Q. A great deal has been said about the books of these companies, and you not having access thereto. Now there are 18 railroads interested in this matter, all of which have furnished statements long ago; now have you anything to say except words of commendation as to the way the representatives of all the railroads have extended every facility and

courtesy to you in the way of giving you full and free access to everything? A. No, sir, I have not. They have extended every facility and every courtesy. And we have not been denied anything.

Q. So if the state had wanted to employ an army of experts, the whole railroad situation as disclosed by their books and papers was open to the state, if it wanted to examine them? A. So far as I know, yes."

T. A. Hamilton (Rec., 4634) another of the state's experts said:

"Q. I wish to ask you, Mr. Hamilton, whether you agree with Mr. Taliaferro, that you have been given free access to all the books and papers and so on, by the various auditors of these different roads in all your investigations. That is true of all these roads? A. Most emphatically.

Q. And you find in that respect nothing but words of praise to speak of the various auditors? A. We have been treated in that respect with all courtesy."

Finding 6 (Rec., 5308) recites:

"It was conceded by the experts that the companies fairly, accurately and honestly kept their books showing the facts in these findings set forth. The experts of the state and of the companies have thereby been enabled to present with certainty and precision all the earnings within the state, both state and interstate business."

(2) THE STATE REFUSED TO REQUEST ANY FINDING OF FACT OR POINT OUT ANY ERROR OR INACCURACY THEREIN.

The findings begin (Rec., 5305) with this statement:

"Prior to the argument the court requested counsel on both sides to submit requests for findings of fact. Complainants' counsel did this. Defendants' counsel have not done so."

In making the final figures, the court (Finding 17, Rec., 5315) said:

"These are found to be correct as now to be set forth, and are adopted by the court. If any error has crept into

them, the court will make proper correction upon his attention being called thereto after these findings have been filed, which can be readily done upon motion or suggestion."

Finding 20 (Rec., 5327) recited:

> "The court believes that the foregoing findings are all that are material and all that are necessary to make. However, if any party believes that any material finding of fact has been omitted, upon application of such party the same will be considered and made if deemed advisable. And likewise if any of the foregoing computations or figures have been erroneously made. But such application to be entertained must be made within thirty days from this date."

Notwithstanding these invitations, the state refused to make any request, or to suggest any error, mistake or inaccuracy in the findings, before or after they were filed. It is true that after the decree it started a suit in a *nisi prius* state court and obtained an injunction compelling the railroads to keep in the two cent rate which was below decreed to be confiscatory. The state supreme court, however, upon June 8, 1909, arose to the occasion and by prohibition (*State ex rel.* v. *Williams*, 221 Mo., 227) nullified this bold attempt to provoke a public controversy and defy the mandate of the federal courts. After that, on July 28, 1909, (Rec., 5265), an appeal was taken here, and the state by its assignment of errors made its *first* complaint as to the correctness of any finding, and even then only in general terms.

(3) THE EFFECT TO BE GIVEN THE FINDINGS.

The testimony discloses that the rates are confiscatory. If, however, there were any question as to the *weight* of the evidence, it is to be remembered that the case now stands upon appeal, where the matter is viewed somewhat differently, than if it were being presented to the court in the first instance. Every presumption is in favor of the finding below, which must be sustained unless the record shows there has been some clear misconception of the evi-

dence or misapplication of the law. This rule has been frequently announced as applicable to masters' reports (*Tilghman* v. *Proctor*, 125 U. S., 126, 149, 31 L. Ed., 664, 668; *Callaghan* v. *Nyers*, 128 U. S., 617, 32 L. Ed., 547, 562; *Furrer* v. *Ferris*, 145 U. S., 132; 36 L. Ed., 649; *Fisher* v. *Shropshire*, 147 U. S., 133, 146, 37 L. Ed., 109), and of recent years has been applied to the findings in equity cases by the court below. Thus, in *Warren* v. *Burt*, 7 C. C. A., 105, 110, 58 Fed. Rep., 101, 106, Judge Sanborn, with the concurrence of Mr. Justice Brewer, said:

> "Where the court below has considered conflicting evidence, and made its finding and decree thereon, they must be taken as presumptively correct, and unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand. *Tiglhman* v. *Proctor*, 125 U. S., 136, 8 Sup. Ct., 894; *Kimberly* v. *Arms*, 129 U. S., 512, 9 Sup. Ct. Rep., 355; *Evans* v. *Bank*, 141 U. S., 107, 11 Sup. Ct. Rep., 885; *Furrer* v. *Ferris*, 145 U. S., 132, 134, 12 Sup. Ct. Rep., 821."

This has since become the settled rule of appellate practice, as will be seen from the opinions of Judges Sanborn (*Farmers Loan & Trust Co.* v. *McClure*, 24 C. C. A., 64, 65, 78 Fed. Rep., 209, 210; *Mann* v. *Bank*, 29 C. C. A., 547, 549, 86 Fed. Rep., 51, 53, *Exploration Co.* v. *Adams*, 45 C. C. A., 185, 188, 104 Fed. Rep., 404, 408; *Thallman* v. *Thomas*, 49 C. C. A., 317, 323, 111 Fed. Rep., 277, 283; *Manhattan Life Ins. Co.* v. *Wright*, 61 C. C. A., 138, 126 Fed. Rep., 82, 83; *Paulus* v. *Buck Mfg. Co.*, 64 C. C. A., 162, 129 Fed. Rep., 594, 597); Thayer (*Snyder* v. *Dodson*, 21 C. C. A., 76, 74 Fed. Rep., 757, 758; *Board of Commissioners* v. *Irvine*, 61 C. C. A., 607, 126 Fed. Rep., 689, 698; *Order of United Commercial Travelers* v. *M'Adam*, 61 C. C. A., 22, 128 Fed. Rep., 358, 365, 366); Morrow (*Idaho Min. & Mill Co.*, 59 C. C. A., 200, 123 Fed. Rep., 396, 397, 398); and Riner (Big *Six Development Co.* v. *Mitchell*, 70 C. C. A., 569, 138 Fed. Rep., 279).

Therefore the findings should be treated as conclusive, especially in view of the facts recited (Rec., 5300-5301) in the opinion:

"Thousands of pages of testimony, taking weeks of time, have been filed. This testimony was orally presented, part to the Master, and part to the Court, accompanied with volumes of statements, reports, schedules and tables. Every phase of every question of both debit and credit has been worked out, tabulated and filed. These exhibits are the result of something like one year of work by the expert accountants representing both sides, as a result of their examinations of train reports, waybills, auditors' books, and of the accounts of the passenger and traffic departments of the several roads. This work required not only much time, but energy, and patience, and learning, and great skill. But each side had accountants of the highest character, and possessing all of those qualifications. The four accountants, Mr. Peabody and Mr. Johnson representing the railway companies, and Mr. Taliaferro and Mr. Hamilton representing the State, impressed me after hearing them testify and being in consultation with them for ten days after the cases were submitted, that the sole purpose of their work was to exhibit the truth, differing only as to extra cost, and that difference of extra cost largely confined to the local passenger traffic, and differing as to the theory as to how the expenses between local and interstate traffic within the state should be divided. Aside from those two questions there is not the slightest variance between the testimony of the experts upon the two sides. During the ten days following the submission of the cases, they and the court being alone, at the request of the court they prepared a statement in each of the nine cases submitted, which have been ordered filed. To each of the nine statements it appended a certificate showing the time covered, and that such statement correctly shows the results of the various assumptions set forth therein, which certificates were signed by the four expert accountants. Seldom, if ever, is a court under greater obligations to expert accountants representing the two sides, than the court and all parties, the railroads and the public, owe these four gentlemen. Usually experts representing different sides do not agree to anything. Here experts representing the different sides agree to everything pertaining to the accounting, the differences only arising as to the basis.

The court is likewise much indebted to counsel on both sides, who for four days argued these cases with a fairness, and wealth of learning, and eloquence seldom displayed at

the bar. And now after the fullest investigation of the record, the court has reached the conclusion that upon this question of fact the statutory rates fixed by either and both statutes are not remunerative. And it only remains for the court to give the reasons for such conclusion."

III.

The rates are confiscatory.

We proceed then to a consideration of the methods adopted to ascertain the sufficiency of the rates.

1. PRECEDENTS.

Judge McPherson in an elaborate opinion (Rec., 5286-5304) and special findings of fact (Rec., 5305-5327) reached the conclusion that the rates in question were clearly confiscatory. His method of ascertaining their insufficiency was exactly the same as that adopted in the Oklahoma (*A. T. & S. F. R. Co.* v. *Love,* 167 Fed. Rep., 493), Arkansas (*In re Arkansas Rates,* 163 Fed. Rep., 141), Nebraska (*Ames* v. *Union Pac. R. Co.,* 64 Fed. Rep., 165; *Smyth* v. *Ames,* 169 U. S., 469, 42 L. Ed., 819), South Dakota (*C. M. & St. P. R. Co.* v. *Tompkins,* 176 U. S., 167, 44 L. Ed., 417) and North Dakota (*Nor. Pac. R. Co.* v. *Keyes,* 91 Fed. Rep., 47) cases.

2. METHOD OF ASCERTAINMENT.

This method of ascertainment was:

(a) The value of the property of the railway company in the state was first determined. The entire railroad and all its facilities and instrumentalities, wholly undivided, are devoted to all the business, state, interstate, freight and passenger. It was, therefore, necessary to determine the value of such portions thereof as were devoted respectively to the carriage of the state freight and

passengers. This assignable proportion of value was ascertained upon what is known as the revenue basis, i. e., by an assignment of such proportion of the total value of the entire property in the state as the earnings from the carriage of state freight and state passenger each bore to all the earnings of all kinds from all the property within the state. When the assignable proportion was thus ascertained as to each class of business, six per cent was calculated thereon as the least annual return to which the owner was entitled.

(b) There were next ascertained the actual earnings from the carriage of state freight and passenger business, respectively, so as to see whether they equalled the sum which the owner was entitled to receive as a return upon the assignable proportion of value. The earnings from any and all classes of business are capable of separate and exact ascertainment. The total expenses within the state, divided as between passenger and freight business, are easily ascertained. It is not possible, however, to accurately subdivide the expenses, so separately found, as between state and interstate business. The division was therefore made in proportion to the revenue from that class of business. That is to say, the freight expense within the state was, as between state and interstate business, divided in the proportion of the freight carriage earnings of each to the entire freight earnings in the state. So the entire passenger expense in the state was, as between state and interstate business, divided in proportion to the entire passenger earnings in the state. The state freight and passenger expenses, respectively, thus ascertained, deducted from the earnings from its class of business, leaves the net earnings, before deducting the extra cost, if any, of doing that portion of the state business.

There was also deducted from the state freight earnings the diminution there would have been thereon had the enjoined rates been put in force, as was done in *Smyth* v. *Ames*, 169 U. S., 469, 42 L. Ed., 819 and *Ames* v. *Union Pac. R. Co.*, 64 Fed. Rep., 165.

(c) It costs more to do the state than the interstate business. The amount of this extra cost can be determined only from the judgment of experts. The amount thus ascertained for each class of business should be deducted from the net earnings found as aforesaid. If the result thus ascertained does not equal the six per cent return upon the assignable proportion of value, the rate is confiscatory.

That this method of ascertainment is in all respects correct is demonstrated by the recent able and thorough opinion of Judge Hook in *M. K. & T. R. Co.* v. *Love*, 177 Fed. Rep., 493.

3. THE VALUE OF THE PROPERTY.

At the threshhold of this case lies the question of valuation, for the return upon that is the vital question in the case.

(a) As a start upon the question of valuation, there must be ascertained the value of the whole property in the state devoted to all its uses. Presumptively, the bonds and stocks properly apportioned, represent that value. However, included therein as elements are the income, value of the good-will, franchises, cost of construction, action of the state equalizing board, and other considerations, such as the company being a going concern.

The rule under which this valuation is to be determined has been accurately stated by Mr. Justice Brewer (*Ames* v. *Union Pacific R. Co.*, 64 Fed Rep., 165, 177); by Mr. Justice Harlan (*Smyth* v. *Ames*, 169 U. S., 466, 547); by Mr. Justice Peckham (*Wilcox* v. *Consolidated Gas Co.*, 212 U. S., 19); by Judge Morrow (*Spring Valley Water Works* v. *San Francisco*, 124 Fed. Rep., 574-592, 593); by Judge Hook (*M. K. & T. R. Co.* v. *Love*, 177 Fed. Rep., 493) and by Judge McPherson below (Rec., 5286-5327).

The question received intelligent consideration from the New York Court of Appeals in *People* v. *State Board*, 196 N. Y., 39,

89 N. E. Rep., 581, where it was said that this valuation was to be fixed as of the time when the inquiry was made, which must necessarily be the result, because an injunction, when it finally goes, is subject to the condition that it may be dissolved at any time in the future if time proves them to be reasonable. (*Ames* v. *Union Pacific R. Co.*, 64 Fed. Rep., 165; *Smyth* v. *Ames*, 169 U. S., 466, 42 L. Ed., 819). A like view was adopted in *Central R. Co.* v. *Northampton Co.*, 11 Northampton Co. Ct. Rep., p. 342.

(b) We turn to some of these decisions from which it will be seen that the whole valuation is to be based upon the consideration of all the facts and circumstances in evidence, bonds, stocks, franchises, cost of construction, earnings and other matters.

In *Ames* v. *Union Pacific R. Co.*, 64 Fed. Rep., 165, 177, Mr. Justice Brewer said:

> "It is not easy to always determine the value of railroad property, and if there is no other testimony in respect thereto than the amount of stock and bonds outstanding, or the construction account, it may be fairly assumed that one or the other of these represents it, and computation as to the compensatory quality of rates may be based upon such amounts. In the cases before us, however, there is abundant testimony that the cost of reproducing these roads is less than the amount of the stock and bond account, or the cost of construction, and that the present value of the property is not accurately represented by either the stocks and bonds, or the original construction account. Nevertheless, the amount of money that has gone into the railroad property—the actual investment, as expressed, theoretically, at least, by the amount of stock and bonds—is not to be ignored, even though such sum is far in excess of the present value."

In *Smyth* v. *Ames*, 169 U. S., 466, 547, 42 L. Ed., 819, 849, Mr. Justice Harlan said:

> "We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the orig-

inal cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property."

In *Spring Valley Water Works* v. *San Francisco,* 124 Fed. Rep., 574, 592, 593, Judge Morrow said:

"But there may be cases where both stock and bonds represent in the market a present actual value in the property of the corporation, and a value that could not be otherwise very well established. In such a case, what objection can there be to giving the evidence such consideration as, under all the circumstances, it deserves? It seems to me there can be none, and such seems to be the opinion of the Supreme Court of the United States. * * *

It follows that in determining the value of corporate property the amount and value of the bonds and stock, if not in excess of the real value of the property, may be considered.

The complaint contends that an element of value in its corporate property is its franchise. * * *

The defendants claim that this franchise has no element of value as property in use by the complainant in supplying water to the city and county of San Francisco and its inhabitants. * * *

The case of *Monongahela Navigation Co.* v. *United States,* 148 U. S., 312; 13 Sup. Ct., 622, 37 L. Ed., 463, was a condemnation proceeding in the Circuit Court of the United States for the Western District of Pennsylvania, under an Act of Congress providing for the condemnation of a lock and dam in the Monongahela river. It was provided in the act that 'in estimating the sum to be paid by the United States the franchise of the said corporation to collect tolls shall not be considered or estimated.' (Stat., 411.) Upon the trial in the Circuit Court, evidence of the value of the franchise was rejected. In the Supreme Court the correctness of this ruling was considered, and upon this question the court said:

'The power to regulate commerce is not given in any broader terms than to establish post offices and post roads, but if Congress wishes to take private property upon which

to build a post office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. And if that property be improved under authority of a charter granted by the state, with a franchise to take tolls for the use of the improvement, in order to determine the just compensation, such franchise must be taken into account. Because Congress has power to take the property, it does not follow that it may destroy the franchise without compensation. Whatever be the true value of that which it takes from the individual owner must be paid to him before it can be said that just compensation for the property has been made. And that which is true in respect to a condemnation of property for a post office is equally true when condemnation is sought for the purpose of improving a natural highway. Suppose, in the improvement of a navigable stream, it was deemed essential to construct a canal with locks, in order to pass around rapids or falls. Of the power of Congress to condemn whatever land may be necessary for such canal there can be no question, and of the equal necessity of paying full compensation for all private property taken there can be as little doubt. If a man's house must be taken, that must be paid for; and if the property is held and improved under a franchise from the state, with power to take tolls, that franchise must be paid for, because it is a substantial element in the value of the property taken. So, coming to the case before us, while the power of Congress to take this property is unquestionable, yet the power to take is subject to the constitutional limitation of just compensation. * * * The theory of the government seems to be that the right of the navigation company to have its property in the river and the franchises given by the state to take tools for the use thereof are conditional only, and that whenever the government, in the exercise of its supreme power, assumes control of the river, it destroys both the right of the company to have its property there and the franchise to take tolls. But this is a misconception. The franchise is a vested right. The state has power to grant it. It may retake it, as it may take other private property, for public uses, upon the payment of just compensation. A like, though a superior, power exists in the national government. It may take it for public purposes, and take it even against the will of the state; but it can no more take the franchise which the state has given than it can any private property belonging to an individual.'

It is true this was a condemnation proceeding, and the question was to determine what was just compensation for

the appropriation of corporate property to a public use, while the case before this court relates to the fixing of water rates which shall be a just compensation for the appropriation of complainant's property to a public use. It is not perceived that there is any difference in the principles applicable to the two cases, and this appears to have been the view of the Supreme Court in *San Diego Water Company* v. *San Diego, supra.*

The complainant next contends that it has an established business as a water company and as a going concern in supplying water to consumers, and that its plant has a value by reason of these advantages beyond the mere cost of reproducing the plant. In support of this view the complainant cites the case of *National Water Works Co.* v. *Kansas City,* 62 Fed., 853; 10 C. C. A., 653, 27 L. R. A., 827. The opinion is by Mr. Justice Brewer of the Supreme Court. On page 865 he says.

'A completed system of water works, such as the company has, without a single connection between the pipes and the streets and the buildings of the city, would be a property of much less value than that system connected as it is with so many buildings, and earning, in consequence thereof, the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city—not only with a capacity to earn, but actually earning—makes it true that "the fair and equitable value" is something in excess of the cost of reproduction.'"

What is said in this case as to franchises being elements of value is not impaired but is supported by the recent case of *Wilcox* v. *Consolidated Gas Co.,* 212 U. S., 19, 44, 53 L. Ed., 382, 396, where Mr. Justice Peckham said:

"It cannot be disputed that franchises of this nature are property and cannot be taken or used by others without compensation. *Monongahela Co.* v. *United States,* 148 U. S., 312; *People* v. *O'Brien,* 111 N. Y., 1, and cases cited. The important question is always one of value. * * * We think that *under the above facts* the court ought to accept the valuation of the franchise fixed and agreed upon under the Act of 1884 as conclusive at that time. The valuation was provided for in this act, which was followed by the company, and the agreement regarding it has been always recognized as valid, and the stock has been largely dealt in for more

than twenty years past on the basis of the validity of the valuation and of the stock issued by the company. * * * What has been said herein regarding the value of the franchises in this case has been necessarily founded upon its own peculiar facts, and the decision therein can form no precedent in regard to the valuation of franchises generally, where the facts are not similar to those in the case before us. We simply accept the sum named as the value under the circumstances stated."

Below, (Rec., 3362; 168 Fed. Rep., 337, 354,) Judge McPherson said:

"There is no evidence that any of the existing bonds were improperly issued either as to amounts or rates of interest. In fixing the value the court has considered the evidence of witnesses as to the stocks and bonds outstanding, and the court has considered the evidence of the fact that the Missouri State Board for taxing purposes has valued these properties. Of course these findings are not binding nor conclusive, but they are persuasive."

In the Oklahoma case, Judge Hook (*M. K. & T. R. Co.* v. *Love*, 177 Fed. Rep. 495, 495, 496) upon this subject, said:

"In logical order there should first be found the value of the company's entire railroad property devoted to public use within the state, upon which, from all its operations therein, it is entitled to reasonable returns. Mr. Justice Harlan, in *Smyth* v. *Ames*, (169 U. S. 466, 546-7), said:

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property."

There is a tendency to deny the amount and value of outstanding stocks and bonds as evidences of value. Wholly aside from any consideration of the rights of investors in good faith or of the general consensus of public opinion as exhibited in a normal market for the securities, such evidences imply a recognition of the effect upon local value of influences without the state. A company may have, elsewhere, property of great value employed in aid of all its transportation business. Distant connections with important commercial centers, an outlet to tide-water and the like may affect favorably the worth of every mile of road in the system. It is general knowledge that there is an important element of value in a railroad as a whole which the part within the state, solely and separately regarded, does not possess. While the question ultimately is the value of the road within the state, the influence upon that value of things external is to be considered; and in the common judgment of men it is to some extent reflected in the amount and value of the stocks and bonds resting upon the system. Nor can it properly be said that such influence affects only the value for the interstate business of the company with which the state is not concerned in making local rates. There is too intimate a relation between commerce within the state and that among the states, and too much interdependence in their mutual growth and prosperity. A railroad system is essentially a unit and is generally so regarded. For instance the part within the state may be assessed for local taxation at its value as an organic portion of a larger whole. (*C., B. & Q. R. Co.* v. *Babcock*, 204 U. S., 585, 598; *Western Union Tel. Co.* v. *Gottlieb*, 190 U. S., 412; *A., T. & S. F. R. Co.* v. *Sullivan*, 173 Fed., 456.) A value of a railroad in a state for local taxation would seem also to be there when rates of transportation are fixed. The assessed value and the acknowledged basis upon which the assessment is made express the judgment of public officers charged with the duty of investigation under the forms of the law and should receive due consideration. There is another matter to be regarded, not specifically mentioned in the above excerpt from the opinion of Mr. Justice Harlan. An established railroad system may be worth more than its original cost and more than the mere cost of its physical reproduction. It has passed the initial period of little or no return to its owners which, of greater or less duration, almost always follows construction, and is not infrequently marked by default and bankruptcy. The inevitable errors in its building which finite minds and hands cannot avoid have been measurably corrected, time and effort have

produced a commercial adjustment between it and the country it was intended to serve, relations have been established with patrons, and sources of traffic have been opened up and made tributary. In other words, the railroad, unlike one newly constructed, is fully equipped and is doing business as a going concern. It has attained a position after many experiences common to railroad enterprises which entail loss and cost not paid from current earnings and which correspondingly make for value."

In the case of *Monongahela Navigation Company* v. *United States* (158 U. S., 312, 328; 37 L. Ed., 463, 468, 469), where the United States sought to condemn for public uses the property of a Navigation Company, Mr. Justice Brewer said:

"How shall just compensation for this lock and dam be determined? What does the full equivalent therefor demand? The *value* of the property, generally speaking, is determined by its productiveness—*the profits which its use brings to the owner.* Various elements enter into this matter of value. Among them we may notice these: Natural richness of the soil as between two neighboring tracts—one may be fertile, the other barren; the one so situated as to be susceptible of easy use, the other requiring much labor and large expense to make its fertility available. *Neighborhood to the centers of business and population largely affect values.* For that property which is near the center of a large city may command high rent while property of the same character, remote therefrom, is wanted by but few, and commands but a small rental. *Demand for the use is another factor.* The commerce on the Monongahela river, as appears from the testimony offered, is great; the demand for the use of this lock and dam is constant. A precisely similar property in a stream where commerce is light, would naturally be of less value, for the demand for the use would be less. *The value, therefore, is not determined by the mere cost of construction, but more by what the completed structure brings in the way of earnings to its owner. For each separate use of one's property by others, the owner is entitled to a reasonable compensation; and the number of such uses determine the productiveness and the earnings of the property, and, therefore, largely its Value.* * * * And if that property be improved *under authority of a charter granted by the state, with a franchise to take tolls* for the use of the improvement, in order to de-

termine the just compensation, *such franchise must be taken into account.* Because Congress has power to take the property, it does not follow that it may destroy the franchise without compensation. Whatever be the true value of that which it takes from the individual owner must be paid to him, before it can be said that just compensation for the property has been made. * * * And here it may be noticed that, after taking this property, the government will have the right to exact the same tolls the Navigation Company has been receiving. *It would seem strange that if by asserting its right to take the property, the government could strip it largely of its value, destroying all that value which comes from the receipt of tolls, and, having taken the property at this reduced valuation, immediately possess and enjoy all the profits from the collection of the same tolls. In other words, by the contention this element of value exists before and after the taking, and disappears only during the very moment and process of taking. Surely, reasoning which leads to such a result must have some vice, at least the vice of injustice."*

In *State Railroad Tax Cases* (92 U. S. 602, 605; 23 L. Ed., 663), it was held:

"The two subjects of assessment are by the statute called the tangible property of the company.

It is obvious, however, that while a fair assessment under these two descriptions of property will include all the visible or tangible property of the corporation, it may or may not include all its wealth. There may be other property of a class not visible or tangible which ought to respond to taxation, and which the state has a right to subject to taxation. Thus, it may occur, as in fact is claimed by one of these companies that, being insolvent, and its earnings not being sufficient to pay anything beyond its necessary expenses for operating the road and its repair, this tangible property represents more than the real wealth of the company and its property. While, on the other hand, another one of these companies is so rich, after paying its expenses and interest on a large amount of debt, it declares large dividends; and this interest and these dividends, when looked to in reference to what is called the tangible property, shows that there is here another element of wealth which ought to pay its share of the taxes. * * * This element the State of Illinois calls the *value of the franchise* and capital stock of the corporation—*the value of the right to use this tangible property in a special*

manner for purposes of gain. This constitutes the third valuation, which is likewise to be made by the Board of Equalization; and, when thus ascertained, is subject to the taxation of the state, counties, towns and cities by the same rule that the value of the road-bed is; namely, according to the length of the track in each taxing locality. The words 'capital stock,' as here used, do not mean the shares of the stock, but the aggregate capital of the company. * * *

The statute of Illinois, and the rule adopted by the Board of Equalization, under the power conferred by the clause we have just recited, may not be the wisest mode of doing complete justice in this difficult matter; but we confess we have, on the whole, seen no scheme which is better adapted to effect the purpose, so far as railroad corporations are concerned, of taxing at once all their property, and of making the tax just and equal in its relation to other property of the State. The rule adopted by the board is as follows:

'First. *The market or fair cash value of the shares of capital stock, and the market or fair cash value of the debt* (excluding from such debt the indebtedness for current expenses), shall be combined or added together; and the aggregate amount so ascertained shall be taken and held to be the fair cash value of the capital stock, including the franchise, respectively, of such companies and associations.

'Second. From the aggregate amount ascertained as aforesaid there shall be deducted the aggregate amount of the equalized or assessed valuation of all the tangible property, respectively, of such companies and association (such equalized or assessed valuation being taken, in each case, as the same may be determined by the equalization or assessment of property by this board); and the amount remaining in each case, if any, shall be taken and held to be the amount and fair cash value of the capital stock, including the franchise, which this board is required by law to assess, respectively, against companies and associations now or hereafter created under the laws of this state.'

It may be assumed for all practical purposes, and it is perhaps absolutely true, that every railroad company in Illinois has a bonded indebtedness secured by one or more mortgages. *The parties who deal in such bonds are generally keen and far-sighted men, and most careful in their investments. Hence, the value which these securities hold in market is one of the truest criteria, as far as it goes, of the value of the road as a security for the payment of those bonds.* These mortgages are, however, liens on the road, and, tak-

ing precedence of the shares of the stockholder, may or may not extinguish the value of his shares. They must in any event affect that value to the exact amount of the aggregate debts. For all that goes to pay that debt and its interest diminishes *pro tanto* the dividend of the shareholder and the value of the share."

In *Columbus Southern Railway* v. *Wright* (151 U. S. 470, 479; 38 L. Ed., 238, 243), it was said:

"The principle here announced is repeated in the well-considered case of *Franklin County* v. *Railroad Co.*, 12 Lea. (Tenn.), 521, 537, 538, 539, which involved substantially the same question of the *situs* for the purpose of taxation of the rolling stock and personal property of railway companies. It was there said by the Supreme Court of Tennessee: 'The property of a railroad company for the purpose of taxation consists of its realty, its local personalty, its rolling stock, its choses in action, and its franchise. *The franchise is the privilege conferred by the charter of incorporation, namely, the right to exercise all the powers granted in the mode prescribed for the purpose of profit.* It is a unit, not confined to any one county in which it may be exercised. *The principal part of the franchise is the right to charge for freight and passengers, the charge being limited within a prescribed or reasonable rate for carriage in the proportion of the distance of transportation.* Obviously, after ascertaining the value of the entire franchise in the state as a unit, no more approximate or just division of this value can be made for purposes of taxation than to allot it among the counties through which the track runs in the proportion of the length of track in the county to the entire length of the road in the state. And this is what was done by the acts under consideration. The choses in action of a corporation, its rolling stock, and personal property according to the principles of the common law, have their *situs* at the domicile or place of business of the company. *Mayor, etc., of Gallatin* v. *Alexander*, 10 Lea. (Tenn.), 475; *Nashville* v. *Thomas*, 5 Cold (Tenn.), 607; Cooley on Taxation, 273. But the Legislature may change the situs of such property for purposes of taxation. *McLoughlin* v. *Chadwell*, 7 Heis. (Tenn.), 389, 406; *Bedford* v. *Nashville*, 7 Heis. (Tenn.), 409; *State Railroad Tax Cases*, 92 U. S., 575, 607; Cooley on Taxation, 274. The rolling stock of a corporation used in transporting passengers and freight over any and all parts of its line of road cannot

be said to have *situs* which would give a preference to any county through which the road may run over any other county in like situation. *The choses in action of a railroad company created by the exercise of its franchises on every part of its tracks, may be equally said to be without situs, so as to give a preference.* The legislature might well treat them as the franchise itself, for, or by, the exercise of which they are created, and proportion the general valuation among the counties through which the road may run according to the length of road in each county. *The roadway itself of a railroad depends for its value upon the traffic of the company, and not merely upon the narrow strip of land appropriated for the use of the road, and the bars and cross-ties thereon. The value of the roadway at any given time is not the original cost, nor, a fortiori, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands, and adding the value of the cross-ties, rails and spikes. The value of land depends largely upon the use to which it can be put and the character of improvements upon it. The assessable value for taxation, of a railroad track, can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings in connection with its capital stock.* No local estimate of the fraction in one county of a railroad track running through several counties, can be based upon sufficient data to make it at all reliable, unless, indeed, the local assessors are furnished with the means of estimating the whole road."

In *Adams Express Co.* v. *State Auditor,* 165 U. S., 194, 221; 41 L. Ed., 683, 695, it was said:

"The valuation was thus not confined to the wires, poles and instruments of the telegraph company, or the roadbed, ties, rails and spikes of the railroad company, or the cars of the sleeping-car company, but included the *proportionate part of the value resulting from the combination of the means by which the business was carried on*—a value existing to an appreciable extent throughout the entire domain of operation.

* * *

Doubtless there is a distinction between the property of railroad and telegraph companies and that of express companies. The physical unity existing in the former is lacking

in the latter; but there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use. * * *

No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons, and furniture, *than that of railroad, telegraph and sleeping-car companies, to road-bed, rails and ties, poles and wires, or cars.* The unit of use and management, and the horses, wagons, safes, pouches and furniture, the contracts for transportation facilities, and the capital necessary to carry on the business, whether represented in tangible or intangible property, in Ohio, possessed a value in combination, and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others. We repeat that, while the unity which exists may not be a physical unity, it is something more than a mere unity of ownership. It is the unity of use, not simply for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case,—resulting from the very nature of the business. * * *

It is this which enabled the companies represented here to charge and receive, within the State of Ohio, for the year ending May 1, 1895, $282,181, $358,519 and $275,466, respectively, on the basis according to their respective returns, of $42,065, $28,438 and $23,430 of personal property owned in that state—returns which confessedly do not, however, take into account contract for transportation and accompanying facilities.

Considered as distinct subjects of taxation, a horse is, indeed, a horse; a wagon, a wagon; a safe, a safe; a pouch, a pouch. But how is it that $23,430 worth of horses, wagons, safes and pouches produces $275,446 in a single year? Or $28,438 worth $358,519? The answer is obvious. * * *

If a railroad may be valued as a unit, rather than a given number of acres of land, plus so many tons of rails and so many thousand ties, and a certain number of depots, shops, etc., there is no sufficient reason why the property of an express company should not be treated as a unit plant. If the State of Ohio had a right to tax the property within the state, and to assess it at its true cash value, there is no Federal restriction which will prevent such property from being 'assessed at the value which it has, as used, and by reason of its use * * *.'"

In *Pittsburg, etc., Railway Co.* v. *Backus,* (154 U. S. 421, 429; 38 L. Ed., 1031, 1037), it was said:

> *"When you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock."*

In *Franklin County* v. *Nashville, Chattanooga, etc., Railway,* 12 Lea., 521, 539, the Supreme Court of Tennessee, in a well considered opinion, which was quoted with approval by this court in *Columbus Southern Railway* v. *Wright,* 151 U. S., 470, 479, thus referred to the means of ascertaining the value of a railroad track:

> *"The value of the roadway at any given time is not the original cost, nor a fortiori, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands, and adding the value of the cross-ties, rails, and spikes.* The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The assessable value, for taxation, of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings in connection with its capital stock. No local estimate of the fraction in one county of a railroad track running through several counties can be based upon sufficient data to make it at all reliable, unless, indeed, the local assessors are furnished with the means of estimating the whole road. * * * And when the statute provides that such property shall be assessed at its 'true cash value,' it means to require that it shall be assessed at the value which it has, as used, and by reason of its use. * * *
>
> Nevertheless, it is ordinarily true that when a railroad consists of a single continuous line, the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road. * * *"

In *Metropolitan Trust Co.* v. *Houston & Texas Central R. R.*, 90 Fed. Rep., 683, Circuit Judge McCormick had occasion to review the valuations placed upon the Texas railroads and, among other things, said:

> "It is therefore not only impracticable, but impossible to reproduce this road, in any just sense, or according to any fair definition of those terms. And a system of rates and charges that looks to a valuation fixed on so narrow a basis as that shown to have been adopted by the Commission, and so fixed as to return only a fair profit upon that valuation, and which permits no account for betterments made necessary by the growth of trade, seems to me to come clearly within the provisions of the Fourteenth Amendment to the Constitution of the United States, which forbids that any state shall deprive any person of property without due process of law, or deny any person within its jurisdiction the equal protection of the laws. It is true that railroad property may be so improvidently located, or so improvidently constructed and operated, that reasonable rates for carriage of freights and passengers will not produce any profit on the investment. It is also true that many railroads not improvidently located, and not improvidently constructed, and not improvidently operated may not be able while charging reasonable rates for carriage of freight, to earn even the necessary running expenses, including necessary repairs and replacements. And there are others, or may be others, thus constructed and conducted, which, while able to earn operating expenses, are not able to earn any appreciable amount of interest or dividends for a considerable time after the opening of their roads for business. This is true now of some of the roads parties to these bills. At one time or another, and for longer or shorter time, it has been true, doubtless, of each of the roads that are parties to these bills. Promoters and proprietors of roads have looked to the future, as they had a right to do, and as they were induced to do by the solicitations of the various communities through which they run, and by various encouragements offered by the state. The Commission, in estimating the value of these roads, say that they included interest on the money invested during the period of construction. This is somewhat vague, but the 'period of construction' mentioned is probably limited to the time when each section of the road was opened to the public for business. And even if extended to the time when the road was completed to Denison and to

Austin in 1873, nearly twenty years after its construction was begun at Houston, it would not cover all of the time, and possibly not nearly all of the time, in which the railroad company and its predecessors have lost interest on the investment. The estimate made on behalf of the railroad in this case of the cost to that company and to its predecessor company of the railroad property, and the business of that company as it exists today, may not be exactly accurate—clearly is not exactly accurate; but it seems to me that it is not beyond the fair value of the property, as it is shown to have been built up and constituted, and to exist today as a going business concern, and that such rates of fare for the carriage of persons and property as are reasonable, considered with reference to the cost of the carriage and the value of the carriage to the one for whom the services is rendered, cannot be reduced by the force of state law to such a scale as would appropriate the value of this property in any measure to the use of the public without just compensation to the owners thereof, and would deprive the owners thereof of the equal protection of the law guaranteed by the Constitution of the United States, as cited."

In Re Advance in Freight Rates, 9 I. C. C. Rep., 382, the Interstate Commerce Commission expressly condemned the rule of undertaking to value a railway by simply estimating the cost of reproducing it. The Commission there said:

"The cost of reproducing railway property has been suggested as a basis upon which return should be allowed. *But this, while of great assistance in arriving at a just result, could not be taken as an exclusive guide. Many of our railways were built years ago, when the cost of construction was much greater than now. In the development of that industry they have been reconstructed and improved. The first outlay has perhaps been rendered practically worthless, and a railway honestly managed, never having paid excessive dividends, may actually represent today much more money than the present cost of building. Those who originally invested their money in this enterprise and have kept pace with the public necessities ought not be required to bear the entire burden of this shrinkage. Moreover, the value of a railway system does not depend upon the mere cost of its embankment, or its equipment. It is rather a question of location, of connections, of terminal facilities, of enterprises along its line; and shall*

nothing be allowed to the foresight and ability which have marked out and perfected that system?"

(c) In any event, interest actually paid should always be returned. Certainly the bonded debt upon which for years interest has been paid as in these cases, is substantial evidence of value. This is especially true of a great system like the C. B. & Q. The authorities leave no doubt upon the subject that interest upon bonds of a going concern is at least a criterion of a higher value than the amount of the bonded debt.

After *C. M. & St. P. R. R.* v. *Tompkins*, 90 Fed. Rep., 363, was reversed (176 U. S., 167; 44 L. Ed., 417, 422), it was again tried (*C., M. & St. P. R. Co.* v. *Smith*, 110 Fed. Rep., 473, 475, 476) and Judge Carland said:

> "The master also finds that, had the rates prescribed by the defendant's schedule been in force in the year 1897, the total net earnings of complainant, both interstate and local, would have been $180,389.02, which would have left a deficiency in the amount due for interest on bonds of $921,360.91. If this fixed charge of interest is an expense which complainant has a right to earn before the state may reduce its earnings, it becomes important to ascertain how much of this interest should be borne by the local earnings. It is found that if the rates proposed by the defendant had been in force in 1897, the net earnings would have been $88,784.60, and that the total net earnings for the same year on interstate business would have been $91,604.42. There seems to be no good reason why interstate and local business should not be charged with the interest on the South Dakota indebtedness in proportion to the amount of annual net revenue produced by each. * * * The solution of this question depends upon the further question as to whether interest on an honest debt is a fixed charge, which the complainant has a right to earn before any reduction in its earnings may be compelled by the state. It is claimed by counsel for complainant that the case of *Reagan* v. *Trust Co.*, 154 U. S., 362, 14 Sup. Ct., 1047, 38 L. Ed., 1014, is decisive upon this point. It is true in that case, which was brought by a second mortgage bondholder, that one of the reasons assigned by the court for its judgment was the fact that for three years prior to the filing of the bill the earnings of the com-

pany, above operating expenses, had been insufficient to pay the interest on the bonded debt, and that the proposed tariff, as enforced, would so diminish the earnings that they would not pay one-half the interest on the bonded debt. Yet there are numerous other reasons assigned by the court for its judgment, and it cannot be said that the case was disposed of upon this one ground alone. But a careful consideration of all the rate cases decided by the Supreme Court compels the belief that it is the opinion of that court, that, when the earnings of a railroad, conducted efficiently, economically and honestly, with operating expenses in no case greater than such efficient, economical and honest management requires, are insufficient to pay one-half the interest on a valid debt, contracted, as found by the master in this case, in a careful, economical and honest administration of the company's business, then a schedule of proposed rates which materially reduce these earnings would be unjust and unreasonable. It must be taken as true in this case that the debt, which is bearing an average rate of 5.69 per cent per annum, is an honest debt. It is also true that if the interest is not paid upon the bonds which the mortgage secures the usual result is a receiver, and the consequent loss of the road.

"* * * I find by an examination of the case of *Reagan* v. *Trust Co., supra*, that the earnings of the railroad whose affairs were under investigation in that case left a surplus over operating expense for the year 1889 of $858,732.24; for the year 1890, $498,177.24; for the year 1891, $555,091,-59. The Supreme Court, in the face of these surplus earnings, granted an injunction, and assigned as one of the reasons that the earnings of the company were not sufficient to pay one-half of the interest on the bonded debt, so that the conclusion necessarily follows that in the opinion of the Supreme Court, if the earnings of a railroad company do not pay but a small proportion of the fixed charges, then these surplus earnings cannot, in a true sense, be considered as dividends."

Unless the property is clearly shown to have been overbonded, then interest is a fixed charge which ought in any event to be paid. Where money has been borrowed and mortgage bonds issued therefor, upon which for years interest has been paid, no court has ever yet denied that such charge was at least to be paid.

In Beale & Wyman on Railroad Rate Regulation, Sec. 388, it is said:

> "It was generally agreed from the very first that whatever be the right to earn a dividend upon stock, the interest upon the outstanding bonds must be protected."

At Sec. 392:

> "But the prevailing rate of interest upon bonds of like security is to be allowed to bondholders and the court will inform itself as to that."

At Sec. 393:

> "Within the last ten years the general principle has become established that there must be left to those who conduct a public enterprise some adequate return on their investment. This newer view was well put in one sentence in *New Memphis Gas Light Company* v. *New Memphis*, thus: 'The company has a right to such gross revenue from the sale of gas as will enable it to pay all legitimate operating expenses, *pay interest on valid fixed charges*, so far as bonds or securities represent an expenditure actually made in good faith, and also pay a reasonable dividend on stock, so far as this represents an actual investment in the enterprise.' "

This quotation from *New Memphis Gas Light Co.* v. *New Memphis*, 72 Fed. Rep., 952, finds ample support in other cases.

In Beale & Wyman, Sec. 437, it is said:

> "All this may well be; but as a matter of fact, the real situation is that a public service company must produce a certain amount of net income, discovered by deducting the gross annual expenses from the gross income, and that net income must be enough to pay all security holders their rate of return—*to the bondholder his stipulated interest*, to the stockholder his fair dividend. And according to modern constitutional law, both have the same protection, and both are subject to the same mischances."

In *C. & N. W. R. R. Co.* v. *Dey*, 35 Fed. Rep., 866, 879-880, Justice Brewer said:

> "Compensation implies three things: Payment of cost of service, interest on bonds, and then some dividend. Cost of

service implies skilled labor, the best appliances, keeping up the road-bed and the cars and machinery and other appliances in perfect order and repair. The obligation of the carrier to the passenger and shipper requires all these. They are not matters which the carriers can dispense with, or matters whose cost can by them be fixed. They may not employ poor engineers, whose wages would be low, but must employ competent engineers, and pay the price needful to obtain them. The same rule obtains as to engines, machinery, road-bed, etc., and it may be doubted whether even the legislature, with all its power, is competent to relieve railroad companies, whose means of transportation are attended with so much danger, from the full performance of this obligation to the public. The fixed charges are the interest on the bonds. This must be paid, for otherwise foreclosure would follow, and the interest of the mortgagor swept out of existence. The property of the stockholder cannot be destroyed any more than the property of the bondholders. Each has a fixed and vested interest which cannot be taken away. I know that often the stockholder and the bondholder are regarded and spoken of as having but a single interest; but the law recognizes a clear distinction. A mortgage on a railroad creates the same right in mortgagor and mortgagee as a mortgage on my homestead. The legislature cannot destroy my property in my homestead simply because it is mortgaged, neither can it destroy the stockholders' property because the railroad is mortgaged. It cannot interfere with a contract between the company mortgagor and the mortgagee, or reduce the stipulated rate of interest; and so, unless that stipulated interest is paid, foreclosure of course follows and the mortgagors' rights, the property of the stockholders, are swept away. Whatever individuals may do by private contract to modify existing rates of interest, the legislature has no compulsory power in the matter. While, by reducing the rates, the value of the stockholder's property may be reduced, in that less dividends are possible—and that power of the legislature over property is conceded—yet, if the rates are so reduced that no dividends are possible, and especially if they are such that the interest on the mortgage debt is not earned, then the enforcement of the rates, means either confiscation, or compelling, in the language of the Supreme Court, the corporation to carry persons or property without reward."

(d) The findings are quite clear as to the value of all the roads in the state (Finding II, Rec., 3210), being that of the C.

R. & Q. at $46,793 per mile, or a total of $53,172,907.83. If one were inclined to go into the facts it could not be made less. This admission (Rec., 4634-4635) was made:

> "Mr. Ladd: We have agreed in this case, as in the others, and that is already a matter of record, that the assessments made by the State Board of Equalization is, for the purposes of this case, one-third of what the State Board regarded as the actual value. In the preliminary statement filed by the St. Louis & San Francisco Railroad Company, the assessment by the State Board is stated to be $20,412,004.90. Now I would like to have Your Honor understand, of course counsel understands, that our agreement extends only to the action of the State Board. And the assessment of the State Board instead of $20,000 and something was $18,000 and something, nearly $19,000. And the difference between the assessment of the State Board and this figure of $20,000 arises from the fact that the County Assessors over the State assess certain portions of the property not within the jurisdiction of the State Board. The difference is about $1,599,000. Of course, as to that, our admission that that $1,559,000 is one-third of anything does not go, because we don't know on what basis the county assesses at. One might be acting one way and one in another.
>
> Mr. Hagerman: Substantially all that $1,559,000 is local property in the large cities. In the other cases we agreed to that, I think. We agreed it was to be on the basis of 2½ times instead of 1/3."

The local assessment of the C. B. & Q. (Rec., 1413) was $530,440, which, with the agreed minimum multiple of 2½ equalled in value $1,326,000 of local property not included by the state board. The valuation of the state board for 1908 (Ev. Sturgis, Rec., 4744, Exhibit 98, Rec., 5102) was $53,172,907.83. The four experts selected by the court so reported. The actual bonded indebtedness of the entire system was (Rec., 1383) $174,172,000; its capital stock (id.) $110,839,100, or a total of $285,011,100. Upon the bonds interest and upon the stock eight per cent dividends have alway been paid (Rec., 4751). The earnings in Missouri are equal to from 20 to 24 per cent of

those of the entire system (Ev. Fisher, Rec., 1000, 1001; Sturgis, Rec., 265). Dividing the value of the entire property by the minimum of twenty per cent of the stock and bonds allotted to Missouri, would equal $57,002,200, a sum in excess of that found below. The property was itemized and its location fixed (Rec., 5121-5240). Its earnings for several different years appeared, as did those of other roads (Ex. 1, Rec., 1230; Ex. 5b, Rec., 2386; Ex. 4, Rec., 3328; Ex. 42, Rec., 4790; Ex. 45, Rec., 4939; Ex. 78, Rec., 5028; Ex. 87, Rec., 5066; Ex. 89, Rec., 5065; Ex. 93, Rec., 5082; Ex. 98, Rec., 5090; Ex. 106, Rec., 5106), as well as their stock and bonded indebtedness, with which comparisons could be made, with the result that the C. B. & Q. reached the best parts of the state and earned more per mile than any other road. The values of the other roads were found (Finding 11, Rec., 5311), the evidence relating to which need not be mentioned, because the correctness of the finding is admitted by a failure to appeal. A new line of the C. B. & Q. was in 1904 and 1905 built in Missouri, between Mexico and Old Monroe, and, exclusive of terminals and equipment, cost in cash $45,867.05 per mile (Ev. Fisher, Rec., 842). In 1907 the C. R. I. & P. built 300 miles of road between St. Louis and Kansas City. Without the city terminals and with a very small amount of equipment, this cost in cash $50,000 to $70,00 per mile (Ev. Frank Nay, Rec., 4690, 4691, 4696). An expert of great experience (Doddridge, Rec., 1578, 1579, 1605, 4463, 4468, 4490, 4491, 4463, 4368, 4780) testified that, without terminals or equipment, it would cost $40,000 per mile to build one of the lines in Missouri, and that with the exception of the K. C., C. & S. and St. L. & H., each road in Missouri was worth three times the amount of the assessment of the state board. Upon the other hand the state refused to fix a value. Its chief expert (Taliaferro, Rec., 4573), testified:

"Q. Now let us see about the value of the property;

whether the value over the bonded indebtedness be assigned and divided between state and interstate, or whether the whole value of the property, regardless of bonds, be taken, it must in some way be divided between state and interstate; that is, the return upon it, must it not? A. Yes, sir..

Q. Have you any fixed notion of what the return ought to be upon the full value? A. What, rate?

Q. Yes. A. No, sir.

Q. That is, speaking for the State of Missouri, there is no figure of return you are willing to concede us? A. No, sir.

Q. Have you any fixed idea of value upon which we can get a return, or that we are entitled to get this return, which you have not fixed in your mind? A. You mean what the property is worth?

Q. Yes? A. No, sir..

Q. You are the chief representative and the chief expert of the state, and you have not a figure to tell us what sum ought to stand as representing the value of the property, upon which we are to get a return, or the rate of interest we are to receive thereon; that is a fact, is it? A. That is a fact."

Again (Rec., 4579):

"Q. Let us see now about the return on the property. We have a vast property here, some 1700 miles of railroad, and within three months, without any allowance for extra cost, without a penny's allowance for extra cost, one way or the other, we have a return of $80,000 for the passenger part of the state, of those 1700 miles of road. Are you willing to give us a figure that the state says shall represent the value of those 1700 miles of railroad, upon which we are entitled to some return from the passenger service? A. I could only refer to the fact, that as I understand it three times the assessed valuation is the value.

Q. Will the state give us that as the valuation for the purposes of this case? A. I do not know.

Q. Have you anybody among your experts that can give us the figure that the state will allow us? A. We could tell you what three times the assessed valuation is.

Q. I understand that. But, Mr. Taliaferro, the state has passed a law fixing the passenger rate at 2 cents per mile, as the maximum, which we say takes our property away from us. Now, manifestly, the men who passed that

law ought to have had some idea of what return they were going to allow on some kind of an investment. You would say that, wouldn't you? A. I would assume that to be true.

Q. You, as the state's expert, can you give us any idea of the amount which you are going to allow us a return upon our passenger business? A. No, sir."

Again (Rec., 4591):

"Q. Now, maybe this will help you some. You give here the assessed valuation of the property, including the franchise, at $20,000,000. Three times that figure would be $60,000,000, representing the value of the property. Don't you do that in this statement of yours? A. We assume that, yes..

Q. Will you let that stand for the purposes of this case, as to the value of the property, upon which we may get a return, leaving it to the court to make the distribution? A. I don't see that that is anything for me to let stand or take out.

Q. It is in your statement? A. Yes, sir; it is in there.

Q. Did you put it in as representing the value of that property? A. We put it in as being in accordance with what was referred to by you as a stipulation in these cases.

Q. You are not willing to say that the court may take that as the fixed value? A. No, sir.

Q. And you are not willing to fix a figure that the court may take? A. No, sir.

Q. You are not willing to say whether it shall be $10,000,000 or $60,000,000? A. No, sir."

These statements though made in the St. L. & S. F. case were by the witness said (Rec., 4767) to be applicable to the C. B. & Q. In these circumstances and upon this record, it is not probable that the court below will be put in error upon account of the total valuation of the property.

(e) Having ascertained the total value of all the property in the state, devoted to all uses, the next step is to find what part of this value is properly assignable to the classes of traffic in question. The only way in which to make this ascertainment is by taking such proportion of the entire value as the earnings from

that class of business which is in question bears to the entire revenue in the state from all sources. This view was adopted in the most recent of the cases, Judge Hook (*M. K. & T. R. Co.* v. *Love*, 177 Fed. Rep., 493, 497), saying:

> "When the railroad within the state is used in both interstate and local commerce it is necessary next to determine what part of its value should fairly be considered as devoted to each use separately, because obviously the company should not exact such excessive rates for local traffic as will also produce a return upon a value employed in a business over which the state has no control. Neither class of traffic, interstate or local, should be made to bear a burden caused by paring the rates on the other to the quick. It is generally agreed that, given the entire value of the railroad property in the state, it is fair to apportion it among the different kinds or classes of business upon a revenue basis, that is to say in proportion to the gross revenue produced by them respectively. And a like rule applies when the questions involved require separate consideration of the freight and passenger business. In this way will be found the fair proportion of value devoted to each particular use, upon which the owner is entitled for such use to a reasonable return. Counsel for defendants object to this method of assigning values, and the observations of Mr. Justice Brewer in the Tompkins case (176 U. S. 175-7) are quoted to show its inaccuracy under stated conditions. But it seems to have been adopted by him previously in the Nebraska case (64 Fed. 165, 179) affirmed in *Smythe* v. *Ames*, *supra*, and by the courts generally in subsequent cases. Moreover it is not perceived that the ton mile basis advocated on its part, is free from similar criticism. The number of tons hauled one mile has no bearing upon the value of the property employed save as revenue is produced, and when that element is recognized we are at once at the revenue basis. The ton mile could not be used in the necessary assignment of values as to mail, express and miscellaneous services, nor as between passenger and freight traffic. Passengers are not transported by weight and the passenger mile and the ton mile as units of measurement cannot be reduced to a common term. In these cases, therefore, the total value of the railroad property in Oklahoma of each complaining company, viewed in all its aspects, should be apportioned according to the rule mentioned, and assigned separately to interstate and local

business, to freight and passenger business, and to mail, express and miscellaneous business, so the effect of the contested rates may be ascertained."

This method of division was adopted by Mr. Justice Brewer, (*Ames* v. *Union Pacific*, 64 Fed. Rep., 165, 179), Mr. Justice Harlan, (*Smyth* v. *Ames*, 169 U. S., 466, 42 L. Ed., 819), Judge Carland (*C. M. & St. P. R. Co.* v. *Tompkins*, 90 Fed. Rep., 363), Judge Van Devanter (*In Re Arkansas Rates*, 163 Fed. Rep., 141), and approved by the Supreme Court of Florida, (*State* v. *Atlantic Coast Line*, 48 Flor., 146, 37 Southern Rep., 657).

The text writers so state the law (Beale & Wyman on Railroad Rate Regulation, Sec. 466).

In *Ames* v. *Union Pacific*, 64 Fed. Rep., 165, 179, Mr. Justice Brewer said:

> "We must take such proportion of the gross investment in the roads as the present earnings from local freights bear to the total earnings of the road."

In *C. M. & St. P. R. Co.* v. *Tompkins*, 90 Fed. Rep., 363, 370, Judge Carland said:

> "No court as yet has promulgated any rule as to how this court shall arrive at a true and just valuation upon which to figure local earnings. In the absence of any such rule this court believes that it is fair and just to first ascertain what per cent of the total gross earnings in any one year the total local earnings are for that year, and having ascertained that per cent, to take the same per cent of the total value of the property as a fair value upon which to fix local earnings."

Upon this subject, Judge McPherson below, in finding 16 (Rec., 5315) said:

> "* * * of the value of that portion of the property assignable to the particular traffic. This value is found by taking for each class of business of the entire value of the property in the state, such proportion as the earnings on that portion of the business bear to all the earnings in the state."

Little objection can be made by the state upon this score, because C. S. Ludlam, the state expert who dealt with the question (Rec., 2026) said:

> "If I made a division, I think I would apportion it on the basis of the gross revenue."

(f) The findings (Rec., 5315-5316) tabulate the percentages of every class of earnings as to the companies whose cases were tried so that if to the value found (Rec., 5311) the percentage be applied, there can readily be determined the assignable value of the property devoted to the use of any particular class of business. In the case of the C. B. & Q. (Rec., 5315-5316) the percentage for state freight is 12.83 and state passenger 13.09, thus making the respective assignable values such proportion of the total valuation (Rec., 5311) of $53,172,907.83.

4. RATE OF INTEREST TO WHICH THE COMPANIES ARE ENTITLED.

After having ascertained the value of the assignable proportion, the next question is as to the rate of return thereon to which the owner is entitled.

(a) This question was considered below (Finding, Rec., 5312; Opinion, Rec., 5302; *St. L. & S. F. R. Co.* v. *Hadley*, 168 Fed. Rep. 317) where six per cent was adopted as such rate. This was the rate held proper in *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53 L. Ed. 383, 398, in the Pennsylvania two cent fare cases (*Penn. R. Co.* v. *Philadelphia Co.*, 220 Pa. 100; 68 Atl. Rep. 676, 679; *Central R. Co.* v. *Northampton Co.*, 11 Northampton Co. Ct. Rep. 342) and in a recent New York case (*People* v. *State Board*, 196 N. Y. 39, 89 N. E. Rep. 581, 587, 128 App. Div. 13, 112 N. Y. Supp. 392, 394, 395). In the recent Oklahoma case (*M. K. & T. R. Co.* v. *Love*, 177 Fed. Rep. 493, 501, 502) Judge Hook said:

"Rates should be just both to the public and the owner of the railroad (*Smyth* v. *Ames*, 169 U. S., 466, 544). It does not appear in these cases that the roads were ill conceived, greater in extent than they should be, unduly expensive in construction, or that they are not operated wisely and economically. It therefore does not seem that rates producing no more than a reasonable return on their fair value could be unjust to anyone. In fixing the measure of return upon on property devoted to public use regard should be had to the character of the business, the locality and the risk; whether the return will be uniform and secure: whether the patronage is steady or fluctuating and quickly responsive to financial and commercial changes; interest rates legal and contractual and the rates customarily sought and required in like investments in the locality; if a railroad, the character of the traffic, whether largely of a kind dependent upon uncertain conditions or so diversified that causes affecting part will not greatly affect the whole. The return should be a fair, just and reasonable one, and not so meager as to repel investment in the property or to embarrass the owner in operating it. In *Wilcox* v. *Consolidated Gas Co.* (212 U. S. 19), the business was that of a gas company in New York City where interest rates are generally the lowest. It dealt in one of the necessaries of urban life. The Supreme Court observed that the risk was reduced almost to a minimum, that the company had a monopoly of the gas service in the largest city in America, secure from competition, and said:

'Taking all facts into consideration, we concur with the court below on this question, and think complainant is entitled to six per cent on the fair value of its property devoted to the public use.'

In a preliminary announcement of the conclusion of the court Mr. Justice Peckham said:

'There is no rule as to any particular rate which any corporation subject to legislative control in the matter has a right to obtain without legislative interference. It depends upon circumstances and locality.'

The present needs of the cases in hand require no further expression than that the returns to the railroad companies shown by the proofs are clearly deficient."

In *People* v. *State Board of Tax Commissioners*, 196 N. Y. 39, 89 N. E. Rep. 581, 586, 587, it was said:

"Having ascertained the entire net earnings, the prob-

lem before the referee was how to fix the proportion of such net earnings which were attributable to the enjoyment of the special franchise. Taking the value of all the relator's tangible property as fixed by him, he computed interest thereon at the rate of 5 per cent, and deducted the resulting amount from the total net earnings. 'The balance of the earnings,' he says, 'after making this allowance for return on the investment in tangible property, results clearly from the ownership and use of the special franchise owned by the company.' He gives as a reason for deducting the rate of 5 per cent in the absence of any testimony as to the proper rate, that it was considered a fair return on the money invested. The Appellate Division, on the other hand, held that 6 per cent should be allowed as a fair return upon the capital invested in the real estate and other tangible property. In the case of *Wilcox* v. *Consolidated Gas Company*, already cited, the Supreme Court of the United States agreed with the District Court that the complainant was entitled to 6 per cent on the fair value of its property devoted to the public use; and in a case like the present, where the net earnings rule is applied, we think that the court below might properly assume as a matter of general knowledge in the business community that a prospective return of at least the legal rate of interest, which is 6 per cent in this state, is requisite to induce investors to embark their money in enterprises of such a nature as that undertaken by this corporation. It is true that this is a question of fact, but the doctrine of judicial notice generally applies only to matters of fact. While evidence as to what constitutes a fair and reasonable rate of return in the business of a corporation was received in this Consolidated Gas Co. Case (C. C.) 157 Fed. 849, 869, and may properly be taken by the court in *certiorari* proceedings under the tax law if the parties see fit to offer it, the court may in the absence of such evidence, adopt 6 per cent as a fair rate for the purpose of calculating the value of a special franchise under the net earnings rule."

In that case below, (128 App. Div. 13, 112 N. Y. Supp. 392, 394, 395,) Judge Kellogg said:

"It is common experience that a long-term bond, properly and amply secured, bearing 4 per cent, produces a fair return upon an investment, the safety of the principal of which is beyond question. The water company has no ex-

clusive right to occupy the streets. The same privilege may be granted to another water company, and ruinous competition may follow. A public water plant may be established, or condemnation proceedings may be instituted to acquire the relator's property for public use. The prosperity of the relator is limited by circumstances and local conditions. Its rates and kind of service may be more or less within the regulation of the public. If by competition or otherwise its business is rendered unprofitable, its plant has little value for use elsewhere. It is evident that the stock of such a company, with such an uncertain tenure, to be marketable at par, should produce a greater return than a first-class bond. Perhaps, without discussing it, we may assume, until the evidence shall furnish us a better guide, that such a stock must earn at least 6 per cent in order to be worth par, or in order that the business may be considered profitable or successful. If a water company can pay but 6 per cent upon the actual value of its tangible property, it is probable that the intangible rights which it has in the streets would not be very desirable and could not be considered as revenue producers. Such intangible property is given a value for taxation, because it is supposed to be earning an income for the company; but if the company earns no adequate return, with good management, such intangible rights have but little value. The intangible rights attach to the fixed property in the streets, and form the special franchise which is to be taxed; and if the business is a losing venture, and is not producing an income of at least 6 per cent, it is perhaps accorded a full value in treating the tangible property in the streets as producing equally with the other tangible property of the company."

In *Wilcox* v. *Consolidated Gas Co.*, 212 U. S., 19, 50, 51, 53 L. Ed., 383, 398, Mr. Justice Peckham said:

"Under the circumstances, the court held that a rate which would permit a return of six per cent would be enough to avoid the charge of confiscation, and for the reason that a return of such an amount was the return ordinarily sought and obtained on investments of that degree of safety in the city of New York. Taking all facts into consideration, we concur with the court below on this question, and think complainant is entitled to six per cent on the fair value of its property devoted to the public use."

In the Pennsylvania case (*Pennsylvania R. Co.* v. *Philadelphia County*, 220 Pa. 100, 68 Atl. Rep., 676, 679,) it was said:

> "What was said in *Brymer* v. *Water Company* was that the company was entitled to a fair return not less than the legal rate of interest. In naming the legal rate, the court was naming a minimum, not a maximum rate. Six per cent is the legal estimate of the legitimate profit from the ordinary safe use of money. No business man in 1846, even if now, went into a new and extensive venture of uncertain outcome without the hope of more than common interest. Because his judgment or foresight was good is no reason that he should be shorn of his profits in the result. What is a fair profit is a complicated and difficult question; but there are certain elements that are plainly to be regarded to avoid injustice, such as the original investment, the risks assumed at that time, the returns as compared with other enterprises as nearly similar as may be, the cost of maintenanance and improvement, the prospects of increase, and the present value in view of the preceding elements. Injustice is done by anything that fails to consider these and to deal equitably with the private as well as the public interests involved. It is not necessarily regulated by what others would now make the venture for under the present circumstances and with present knowledge."

In *Central R. Co.* v. *Northampton Co.*, 11 Northampton Co. Ct. Rep. 342, it was said:

> "If the plaintiff is entitled to measure its fair profit at a minimum of six per cent upon its investment, after payment of fixed charges, operating expenses, etc. (220 Pa. 115), the matter becomes free from that difficulty of investigation which would arise if the reduction still left the company in enjoyment of a percentage of profit on its capital exceeding the legal rate of interest. The burden of the company to prove it unfair against the usual presumption is satisfied when this can be shown, for I understand the meaning of the Chief Justice to be that as six per cent is the legal rate which a man may charge for the use of money in Pennsylvania it is judicially declared as a minimum rate of profit less than which the Legislature cannot *compel* him to take upon other investments of capital within the constitutional prohibition of injustice, and tending to confiscation, although voluntarily he may take less in both cases. His reference to what is

a fair profit being a difficult and complicated question is predicated upon the conditions to be considered in cases where regulation reduces a larger rate to a point that is yet in excess of six per cent. In the case against Philadelphia County the estimated return was 5 1/10 per cent. But if I am mistaken, it does not affect this decree."

Finding 12 (Rec., 5312) below, recited:

"The interest obligations except as already stated are just and reasonable and should be paid in full with some dividends to the stockholders in addition. However, and entirely aside from the question of interest, the rates and earnings should in any event be such as to produce a fair return upon the valuations hereinbefore fixed. And such earnings should be on the property within the state as would be equivalent to six per centum per annum, that per cent being a fair return upon such valuations."

Judge McPherson in his opinion (Rec., 5302) said:

"The Supreme Court during the present year in the case of *City of New York* v. *Consolidated Gas Company of New York* (211 U. S.....) decided that six per cent was fair and right to to be given to the owners upon the true valuation. My opinion is that while a gas plant is in some respects different from a railroad, that a railroad property, properly built, and properly managed, should over and above expenses make a return of six per cent per annum."

(b) Manifestly, if six per cent as a return upon railroad property should be treated as fair in the old settled and thickly populated states of New York and Pennsylvania, it would not be unfair in Missouri. At this rate and upon the valuations found, the C. B. & Q. was entitled (Rec., 5324) to receive for the carriage of state freight $409,325.04, and for state passengers $417,620.02, or a total of $826,945.06. The question in the case is whether it has been able so to do.

5. Division of expenses between state and interstate business.

Having found then the amount of net returns to which

the railroad company was entitled, it is next necessary to consider the earnings and expenses to ascertain whether there has been received the amount which, under the law, should have been returned.

(a) The earnings are fixed and were ascertained with certainty. So with the division of expenses among the different classes of business. The differences between the parties arise solely as to the division of expenses between state and interstate business, and as to how much more it costs to do the state than the interstate business. This clearly appears from the cross examination of the state's chief expert (Ev. Taliaferro, Rec., 4554-4598; 4767-4773) and the evidence of the General Auditor of the C. B. & Q. (Ev. Sturgis, Rec., 4743-4762; 4773). Mr. Taliaferro (Rec., 4573) said:

> "Q. Now to put the thing plainly, and into a nut shell, so the plainest man can read it at a glance, so there may be no misunderstanding whatsoever,—if the revenue basis is right, in ascertaining the first division of cost as against expenses and in ascertaining the increased cost, then there is no criticism to be made upon our statement? A. And if the revenue basis is right for dividing the value of the property?
>
> Q. Yes. A. No, sir.
>
> Q. In other words, if the revenue basis for dividing the returns upon the value of the property is correct, and the revenue basis is right, as to the apportionment of expenses, our statement is correct and must stand? A. We have no criticism to make."

So as to the accounts produced by the C. B. & Q. he (Rec., 4767-4768) said:

> "Q. I want you to take with me, for a moment, exhibit 98, and see where we differ: Take first the earnings given there for passenger, state and interstate; there is no objection to that, is there? A. No, sir.
>
> Q. That is correct? A. Yes, sir.
>
> Q. So far as expenses are concerned, the grand total

is correct?" A. They are figures shown by the company's books, yes, sir.

Q. And so far as the division upon the revenue basis, as Mr. Sturgis made it, that division is correct? A. We have not worked that out.

Q. There is no objection to it? A. No objection to it.

Q. And so far as the percentages ascertained, there is no objection to those? A. No, sir.

Q. So I might say, if the division upon the revenue basis, as is stated here, is the right theory to be adopted, there is practically no objection to Mr. Sturgis' statement? A. Well, all I could say would be that we have not checked the figures. We might do it in the future.

Q. You haven't criticism to make of them now? A. No, sir; no criticism."

Again he (Rec., 672) said:

"And then I take it you have not any criticism to make upon Mr. Sturgis' figures, if they ought not to be treated as whole? A. No, sir, because I would not know how to separate the expenses of mail and express from the expenses of handling passengers.

Q. And you have nothing to suggest along that line? A. No, sir."

The court below spoke in no uncertain terms upon this subject. Finding 6 (Rec., 2309) recited:

"No difference of consequence has arisen between the parties as to the expense of doing the entire business in the state. With reasonable certainty the expenses for doing the freight and passenger, including miscellaneous of each, can be and have been separated. The earnings are known and fixed and in these findings stated to a certainty. But as to the expenses as between state and interstate business, there has been a controversy and such is the principal controversy in the cases. There is no known fixed or certain rule for determining how the separation of expenses shall be made. The same cannot be made with mathematical certainty."

In the opinion (Rec., 2301), it was said:

"The four accountants, Mr. Paddock and Mr. Johnson representing the railway companies, and Mr. Taliaferro and

Mr. Hamilton representing the state, impressed me after hearing them testify and being in consultation with them for ten days after the cases were submitted, that the sole purpose of their work was to exhibit the truth, differing only as to extra cost, and that difference of extra cost largely confined to the local passenger traffic, and differing as to the theory as to how the expenses between local and interstate traffic within the state should be divided. Aside from those two questions there is not the slightest variance between the testimony of the experts upon the two sides."

6. DIVISION OF EXPENSES AS BETWEEN STATE AND INTERSTATE BUSINESS SHOULD BE UPON THE REVENUE BASIS.

(a) That the proper method of division of expenses, as between state and interstate business, is upon the revenue basis, was fully considered below and was there held to be proper. It was the basis twice adopted by Mr. Justice Brewer (*Ames* v. *Union Pacific*, 64 Fed. Rep. 165; *C. M. & St. P. R. Co.* v. *Tompkins*, 176 U. S., 167; 44 L. Ed., 417), by Mr. Justice Harlan (*Smyth* v. *Ames*, 169 U. S., 466; 42 L. Ed., 819), by Judges Thayer and Amidon (*C. M. & St. P. R. Co.* v. *Keyes*, 91 Fed. Rep. 47, 55), by Judge Van Devanter (In Arkansas Rates 163 Fed. Rep., 141), and by the La Follette Commission (*Buell* v. *C. M. & St. P. R. Co.*, 1907), and by Judge Hook in the Oklahoma case (*M. K. & T. R. Co.* v. *Love*, 177 Fed Rep., 493, 498, 499).

Upon this subject, Judge Hook in the latter case said:

"Having the total value of the railroad property in the state, the gross revenue from all operations therein, the gross revenue from each class of business, interstate and local freight and passenger, and mail, express and miscellaneous, and the proportionate property values devoted thereto respectively, there must then be ascertained the net revenues from the local freight and passenger business so that their relation to the value of the property employed in producing them may be disclosed and the ultimate question answered, to-wit, whether the rates from which the net revenues come are reasonably compensatory. At this point arises the principal controversy. A substantial part of the expense of railroad operation is in-

curred indiscriminately in all its business. For example, the maintenance of way and structures in a state, which makes one of the most important general expense accounts, is almost entirely for the common benefit of all traffic, interstate and local, freight and passenger. As between freight and passenger traffic a large part of the expenses may be directly located and distributed, and it is the custom to apportion the remainder by various rules not necessary to mention here; but generally speaking it is impracticable in railroad business to separate expenses into the interstate and local and the minor and incidental operations. From the very nature of the case, therefore, some rule must be adopted for charging to each of them their fair and equitable proportion of the common expense. Of necessity it must proceed upon average conditions commonly known or shown to exist, and it argues nothing to say that it does not fully apply to this or that exceptional instance. A general rule based on experienced observations is fair, and what is lost by its application in one place is doubtless gained in another, and an equitable equilibrium maintained. Of those suggested the revenue basis appears to be much more uniform in its adaptability and much less subject to substantial objection. It has been frequently employed (*Ames* v. *Union Pacific*, 64 Fed. 165; *Smyth* v. *Ames*, 169 U. S., 466; *C. M. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 167; *Northern Pacific* v. *Keyes*, 91 Fed. 47; *In re Arkansas R. Rates*, 163 Fed., 141; *St. Louis & S. F. R. Co.* v. *Hadley*, 168 Fed. 317). It is the one to which the mind naturally turns in every problem involving the charging of common expense to different departments of a business. When a general or common expense cannot be located what is more obviously reasonable than to say in the first place the different branches or department shall bear it according to the value of their products or their gross earnings, and then make due allowance for exceptional conditions if any are perceived? That seems at the start to satisfy the mind intent on equity. It is a working basis for the distribution of all expense incident to a railroad business among its revenue yielding operations of every character. On the other hand, the ton mile rule for which contention is made can be applied to nothing but the freight business. Besides being entirely useless as a distributor of expense to the mail and express business of a railroad and to the services of switching, demurrage, storage and the like, the ton mile rule is radically inaccurate when applied to the very business to which it is best adapted. It does not consider the differences and risks in the character of the freight transported,

whether glassware or sand, furniture or coal; whether the freight is moved in carload or less than carload lots; whether the haul is long or short; the character of the traffic as regards time consumed in transportation and occupation of the track and equipment; the number of expensive handlings at terminals and terminal expense generally. The ton mile theory places interstate traffic while it is moving in the state upon the basis of local traffic and therefore ignores the effect of the external haul upon the internal cost. Concededly the average of haul of interstate traffic is materially greater than that of traffic wholly within the state and it is an axiom in transportation that the longer the haul the less the cost per ton per mile. These matters in the aggregate run enormously into the cost of freight transportation, but none of them are picked up or accounted for by the ton mile rule which rests on the erroneous assumption that the transportation costs the same per ton per mile regardless of character, time, distance or circumstance. The revenue rule is not ideal, but revenue is the products of rates and service, and, generally, in the making of rates some regard is had to the cost of service. In other words, earnings reflect to some extent the important differences in the cost of of service which the ton mile rule entirely ignores."

In *Buell* v. *C. M. & St. P. R. Co.*, R. R. Co. of Wis. (1907), pp. 179, 180, it was said:

"When it comes to the apportionment of the expenses of either the passenger or the freight traffic in this state and between intra and interstate traffic the situation grows still more complicated. In this case an actual separation is, of course, out of the question. The best that can possibly be done is to find some unit or basis upon which some arbitrary division can be made that is equitable to all classes of the traffic. Such a unit, to be fair, must be so adjusted as to take into account the different conditions under which the transportation services were performed as well as the factors which governed the apportionment to the state. The question here is where can such a basis be found. Of the several units that have been discussed and upon which at least some of the various items of cost have been divided there would seem to be none which is entirely free from objections. The one to which the fewest objections can be raised is perhaps the gross earnings basis. As has been shown already the gross earnings of the intra-state traffic were credited to the state for their full amount while gross earnings from the interstate traffic were credited to the

state in the proportion which the length of the haul within this state bore to the total length of the haul. The earnings in this case also include the revenue from the high rate as well as from the low rate traffic and from both local and through business. The operating expenses were in part actually allotted to the state and partly apportioned on such operating units as the train, car and locomotive mileage. A closer analysis of the facts shows that there is a fairly close relation between the methods upon which the earnings and expenses were allotted to this state, which in turn would suggest that the gross earnings might be a fair basis upon which to distribute the expenses between the intra-state and the interstate traffic. This suggestion is strengthened by other facts. As stated above, there are good reasons for maintaining that the local rates are so much higher than the through rates that the greater revenue from the former traffic will offset its extra cost. It has been further shown that this increase in the revenue affects practically all classes of the traffic to relatively about the same extent. It follows from this that there is a closer or more intimate adjustment between rates and expenses than might be expected. This is an important fact which tends to confirm what has already been said, that gross earnings constitute a fair basis upon which to allot expenses between the intra-state and the interstate business."

Judge Van Devanter (*In re Arkansas Rates*, 163 Fed. Rep., 141, 142) said:

"Undoubtedly these differences furnish a standard by which to apportion the total cost between the traffic which is intra-state and that which is interstate. Other standards are suggested, but the proofs indicate that none of them is as satisfactory or accurate as is the difference in cost in its relation to the revenue."

This was the basis used by Mr. Justice Brewer in *Ames* v. *Union Pacific R. Co.*, 64 Fed. Rep., 165, 182, where he said:

"Obviously, the cost of transportation would be the same whether the companies received the prices which they did in fact receive, or the reduced rates prescribed by house roll 33. If the cost of hauling local freight was the same as that of the other business done by the roads, in order to ascertain what amount the companies earned from local freight, it would be necessary to multiply the gross receipts by the percentage of

expenses to earnings. This would show the amount that it cost to carry that freight, and the difference between that cost and the receipts would be the amount of the net earnings. From such net earnings subtract the amount of reduction caused by house roll 33, and the result will show whether, under such rates, the companies would have earned anything from local freight, and, if so, how much."

Again, at page 184:

"This is upon the assumption that the cost of carrying local freight is the same as that of carrying through freight, and hence that, applying the general per cent of expenses, enables us to determine accurately the earnings from local freight."

So in *Northern Pacific R. R. Co.* v. *Keyes*, 91 Fed. Rep., 47, 52, 53, Judge Amidon, with the concurrence of Judge Thayer, said:

"The fundamental question in all cases like these is, will the rates prescribed by the state pay the expense of doing the local business, and leave to the carrier a reasonable compensation upon the fair value of the property which it employs in performing the service? Certain of the factors necessary to a determination of this question are capable of definite knowledge; others must forever rest largely upon opinion. The income derived from the carrier from the business which it conducts within the state can be ascertained accurately from the records of the company, but the expense of doing that business is not susceptible of mathematical ascertainment. Many of its items apply equally to local and interstate business. The different kinds of traffic are often carried in the same train, and not infrequently in the same car. It is absolutely impossible to divide the cost of traffic thus moved, and say that this amount should be attributed to local business and that amount to interstate. It is possible, however, to ascertain the relation of the cost of doing the entire business of a railroad to its gross income. These amounts are shown by the books of the company in dollars and cents, and furnish the basis from which all investigation as to the cost of doing local business must start."

In pointing out (pp. 56, 57) the difficulties with dealing with the ton mile basis, it was said:

> "In justification of the rates fixed by the commission, two theories are put forth by its secretary and counsel. The first is based upon what the secretary denominates 'North Dakota's proportional' of the terminal tariffs for interstate business. The second is based upon a comparison of the rate per ton mile under the commission's schedule with the rate per ton for the entire business of the roads. * * *
>
> Under the other theory, the rate per ton mile of the entire business of the plaintiffs is found to be much less than the rate per ton mile on local business under the rates prescribed by the commission, and it is claimed that this fact establishes the reasonableness of the commission's rates. This, however, by no means follows. It is axiomatic that the rate per ton mile rapidly decreases as the length of haul increases. The evidence shows, as has already been pointed out, that the average haul of traffic local to North Dakota is less than one-fourth of the average haul on the entire business of the roads. This fact alone would necessitate a much lower rate per ton mile on general than on local business. But it must be further remembered that the great volume of traffic carried by the complainants consists of heavy articles, like coal, lumber, grain and live stock, which are invariably moved at the lowest of all rates; while much the larger portion of local traffic in North Dakota consists of merchandise in less than carload lots, which, under all classifications of freight, is charged a higher rate than any other kind of traffic. In ascertaining the cost per ton mile of doing the entire business of the roads, the enormous tonnage of these heavy commodities is embodied in the calculation. No distinction is made between groceries and lumber, between dry goods and live stock. It needs no argument to show that the average cost per ton mile of a traffic composed mainly of such articles as lumber, coal, grain and live stock, hauled on an average more than 400 miles, affords no indication of what the average price per ton mile ought to be for a traffic which is made up for the most part of merchandise that is hauled on an average less than 90 miles."

In *C., M. & St. P. R. R. Co.* v. *Tompkins*, 90 Fed. Rep., 363, Judge Carland held a law valid because of large gross returns, regardless of the cost of doing the state business. In reversing his

action, his position was in *C., M. & St. P. R. Co.* v. *Tompkins*, 176 U. S., 167, 177, 44 L. Ed., 417, 422, by Mr. Justice Brewer thus stated:

> "But here we are confronted by the ninth statement in the findings of fact, to-wit: 'that the court is unable to find from the testimony what the actual cost of earning the local earnings for the fiscal years ending June 30, 1894, 1895, 1896 and 1897 was.' If the court meant by that to say that there was no testimony tending to show what was the cost of doing local business, we are constrained to say that the statement is erroneous, because there was abundance of testimony bearing upon that question. If it meant simply that it could not determine that fact with mathematical accuracy, basing it upon testimony of the exact amount of money paid out for doing such work, it is undoubtedly true, but there are many things that have to be determined by the court and jury in respect to which mathematical accuracy is not possible."

That the first division of expense was to be upon a revenue basis was clearly recognized, because the learned justice said:

> "The testimony discloses that the operating expenses of the entire system during each of the four years was over 60 per cent of the gross receipts. If the cost of doing local business in South Dakota was the same as that of doing the total business of the company, then the net earnings of that local business would not exceed 40 per cent of the gross receipts." Below (Rec., 5298-5299, 168 Fed. Rep., 317, 350, 351, 355),

Judge McPherson said:

> "And the courts passing upon the question have invariably recognized this as being so, and that the revenue theory is the correct one as against the ton mile. This was so recognized by the Supreme Court of Pennsylvania in case of *Railroad* v. *Pennsylvania County*, 68 Atl. Rep., 677, but not discussed. In *R. R. Co.* v. *Tompkins*, 90 Fed., 363, Judge Carland, of the South Dakota District, in passing on the statutes of that state, said:
>
> 'This court believes that it is fair and just to first ascertain what per cent. of the total gross earnings in any one year the total local earnings are for that year, and having ascertained that per cent. to take the same per cent. of the total

value of the property as a fair value upon which to fix local earnings.'

The decree was reversed, and although an equity case, remanded because of a failure to make a material finding. (176 U. S. 167.) The same case under the title of *R. R. Co.* v. *Smith,* 110 Fed., 473, on final hearing resulted in a decree enjoining the rates, and the question of expenses was arrived at by the extra cost and on the revenue theory. The case of *R. R. Co.* v. *Keyes,* 91 Fed., 77, is an opinion by District Judge Amidon, concurred in by Circuit Judge Thayer, enjoining North Dakota statutory rates. The argument of the opinion condemns the ton mile theory, and adopts the revenue theory. The criticism of the case is, that conditions in sparsely settled North Dakota are not like those in this state. But the question of which theory was the more accurate for computation, was full covered, and the ton mile was condemned. *In re Arkansas R. R. Cases,* (163 Fed., 141), decided but a few months since by Judge Van Devanter of this Circuit, a temporary injunction was issued against the enforcement of the Arkansas statutory freight and two cent passenger rates. And in most respects the State of Arkansas with reference to rates is like that of Missouri, especially the south half of Missouri. Judge Van Devanter in discussing this question, said:

'Other standards are suggested, but the proofs indicate that none of them is as satisfactory or accurate as is the difference in cost in its relation to the revenue.'

And the proofs, including statistics and tables and some of the same expert witnesses on each side, were the same as in the cases at bar. The great case from Nebraska of *Smyth* v. *Ames* was heard on the Circuit by Justice Brewer on oral testimony, as the cases at bar have been heard. The entire discussion of the question by Justice Brewer in a lengthy opinion is on the extra cost and revenue theory, entirely ignoring the ton mile theory. That case resulted in the state statutory freights being enjoined by Justice Brewer, District Judge Dundy concurring. The case was carried to the Supreme Court (169 U. S., 467), resulting in an affirmance of Justice Brewer's decree. The opinion of the Supreme Court by Justice Harlan is exhaustive, and the tables used by him to show the facts, and the entire argument is with reference to the extra cost and revenue theory, utterly ignoring the ton mile theory. Recurring to the Tomkins case, (90 Fed., 363), above alluded to, that case was reversed by the Supreme Court. (176 U. S., 167), and the question of fact was only discussed from

the revenue theory. The reversal was only because the lower court recited that it was unable to ascertain what was the actual cost of earning the local earnings for certain years. But as the lower court on the first hearing proceeded on the extra cost and revenue theory, and as that was what was discussed by the Supreme Court, and under the mandate the case went to decree (110 Fed., 447), on the revenue theory, I am convinced that the Supreme Court for the guidance of trial courts has adopted the revenue theory as the one more just and equitable both to the patrons of the road and to the companies. So that we have the Supreme Court in the two cases recognizing the revenue theory. Two Circuit Judges of this Circuit have so held. And the same holdings have been made by at least three District Judges, and the Supreme Court of Pennsylvania impliedly, although the argument in that opinion is not strengthened by reason of a statement as to the measure of proof, concerning which the minority opinions without doubt are correct. As an argument against the revenue theory, and for the ton mile theory, no court has spoken insofar as counsel on both sides and I are advised. In some phases this a question of fact, or logic, or argument, or opinion, partaking of all. But so many eminent courts have thus spoken, even though not a question of law, and even though the traffic in the states differ, yet such opinions tend most strongly to create an undoubted belief that the cost for carrying both passengers and freight locally is greater proportionately than for doing a long or interstate business, and that the revenue theory is the only one to apportion the cost of each business. * * * The entire state and interstate earnings of each of the roads within the the state is known to a certainty. The expenses are known and fixed. To apportion these expenses, must be done according to one of the two theories, and the correct theory is that according to revenue. One theory or other must be applied to both freight and passenger expenses, and the court should not adopt the one theory as to part, and the other theory as to another. The one theory is helpful to the one side, and the other theory helpful to the other side, the one theory to the one side in freight, and the other theory to the other side in passenger. But an arbitrary splitting of of theories is illogical and unfair, and cannot be recognized. The court has adopted the revenue theory because a great number of the best railroad experts of the country, against a very limited number to the contrary have so testified. Every court that has ever had this question before it insofar as I am advised by the briefs of counsel and my own independent in-

vestigation has so held in the cases hereinbefore cited of the Supreme Court of the United States; in the two cases, by two Circuit Judges of this Circuit; by three District Judges of this Circuit, and by the Supreme Court of Florida, *State* v. *Atlantic Coast Line*, (37 So. Rep., 657). And Beale & Wyman on Railroad Rate Regulation, Sec. 466, announces such as being the correct rule. The values of the property within the state have been fixed by the court. The entire earnings within the state, interstate and state, freight, passenger, and miscellaneous of each, have been fixed. The entire expense is known, including the extra cost of each. To ascertain whether the result is a profit, and if so, what per cent, or a loss, is but a problem of primary arithmetic, as is shown by Judge Van Devanter in *Arkansas Rate Cases* (163 Fed. Rep., 141). There are other methods equally simple, the resultant figures of course being the same."

In the findings and conclusions (Rec., 5309) below, it was recited:

"The earnings are known and fixed and in these findings stated to a certainty. But as to the expenses as between state and interstate business, there has been a controversy and such is the principal controversy in the cases. There is no known fixed or certain rule for determining how this separation of expenses shall be made. The same cannot be made with mathematical certainty. Complainants claim that the division should be made upon the revenue basis; defendants claim that it should be made upon the ton mile basis for freight, and passenger mile basis for passengers, classifying the miscellaneous earnings as and with freight and passenger earnings respectively. By the revenue basis is meant to assign such proportion of the total expense in the state on that class of business as the earnings of that class of state business bears to all the earnings state and interstate from the same class, or, which is the same thing, ascertain what the percentage of all expenses is of all earnings, then multiply that by state earnings of any class, and thus obtain the sum to be assigned as state expense. The ton mile basis as to freight means the assignment as state freight expenses of any class of business such proportion of all state expense as the number of ton miles per ton per mile of state freight bears to the total ton miles of all freight hauled within the state. By the passenger mile basis is meant the assignment as state passenger expenses such proportion of all passenger expenses as the number of passengers in state

business carried one mile bears to the whole number of passengers state and interstate carried one mile. For reasons stated in an opinion herein filed, the revenue basis has been and is adopted as the only logical basis to use in arriving at a correct conclusion. The one basis or the other as a whole must be adopted. Either side can make a better showing by adopting the one basis in part of the accounting, and the other basis for the other. Neither should be and is allowed to do this. As will presently appear, the state has attempted to do this in making its passenger earnings accountings."

(b) The finding of the court below is abundantly sustained by the evidence and is supported by reason, as a few observations will show.

The ton mile percentage of the C. B. & Q. was (Rec., 1453, 5103), taken to be 10.62 per cent as against the revenue percentage (Finding 17, Rec., 5315) of 19.28 per cent. If double extra cost were taken as a minimum figure upon the ton mile basis, this would assign as state expense 19.21 per cent, more than assigned upon the revenue basis without extra cost. Upon that basis the freight law is confiscatory.

(c) If the division of passenger earnings were upon a passenger mile basis, then the results would make no practical difference in this case, because the state's proportion of passenger mileage is 45.92 per cent (Rec., 5093), about the same as the revenue proportion (Rec., 5315) of 47.55. Thus, a division of the business upon a revenue basis assigns as state passenger expense 47.55 per cent of all passenger expenses, while such a division upon a passenger mile basis would assign 45.92 per cent, making little difference in passenger loss, if divided upon the passenger mile instead of revenue basis. With the other roads the passenger mileage is greater than the revenue (Rec., 4793, 4939, 4957, 5034, 5044, 5055). So, if adopted, it would increase the state passenger expense and decrease the net earnings. Thus, upon the St. L. & S. F. (Rec., 4793) the passenger mileage proportion is 59.32 per cent and the revenue 51.56 per cent. To be consistent the state

must, if insisting upon the ton mile basis for freight take the passenger mile theory. The C. B. & Q. is the only road where a division of expenses according to passenger miles would be as favorable to the state as the revenue basis. This may be the real reason why the case of that company was the only one appealed. The only conceivable reason why the passenger mile basis is used is that the state combines and treats as a whole, passenger, mail and express business. As passenger miles have some relation to the passenger business, it could with some plausibility be used as a basis of dividing a whole expense consisting in the larger part of the passenger business. If mail and express were separated, of course, these could be no division upon a passenger mile basis, and the division could only be upon a revenue basis. If, however, the division be upon the revenue basis, it can be used with any and all classes of business, separately or as a whole.

(d) The reasons why the revenue basis should be adopted as against the ton mile basis, are equally applicable as against the passenger mile basis, even though the latter basis would not injure complainant.

(e) That the revenue is the truer basis of division is clearly shown by Johnson's Exhibit 55 in the Missouri Pacific case, giving the reasons therefor in these words:

EXHIBIT 55.

"The reasons why the proportionate part of the expenses charging to state freight should be determined upon a revenue and not upon a ton mile basis.

"(1) Such is the way it has always been actually ascertained in previous litigation; it was used as the basis of the bills in final decrees, and actually adopted by the courts in cases where a decision upon the point was necessary. (*Smythe* v. *Ames,* 64 Fed. Rep., 165, affirmed; 169 U. S., 466, 42 L. Ed., 819; *C. M.* & *St. P. Ry. Co.* v. *Tompkins,* 176 U. S., 167, 44 L. Ed., 417; *C., M.* & *S.. P. Ry. Co.* v. *Keyes,* 91 Fed. Rep., 47).

(2) It is the only certain, simple and uniform method. (a) It is the simple method because it is the easiest; given the state and interstate freight earnings, with the undivided freight expenses, and there only remains an arithmetical problem. (b) It is certain, because in this way all actual earnings are actually accounted and allowed for, whether arising from that portion of the property wholly devoted to state freight,, or that devoted to interstate, or that devoted to both. (c) It is the only uniform method, because it is the only method by which a division for all purposes can be made. It is necessary to fix a valuation of that portion of the property which is used for carrying state freight. The courts (*Smythe* v. *Ames,* 64 Fed. Rep., 165, 170; *C. M.* & *St. P. Ry. Co.* v. *Tompkins,* 90 Fed. Rep., 365, 370, 110 Fed. Rep., 473, 475; *C. M.* & *St. P. Ry. Co.* v. *Keyes,* 91 Fed. Rep. 47, 55), the state's expert (Ev. Ludlam, pp. 1153, 1154) and complainant agrees that this is to be ascertained upon a revenue basis. If such valuation is to be so ascertained upon a basis of revenue, it would not be uniform to adopt a ton mile basis for dividing the expenses. That basis rests for its justification entirely upon the length of the haul, which lessens the expense. Many of the expenses, especially of the terminals, are in nowise affected by the haul. So, the state's expert (Ev. Ludlam, 1274, *et seq.*) concedes. The freight expenses of Kansas City terminals aggregate $783,647.66 per annum. The St. Louis freight terminal expenses exceed those of Kansas City. The expenses of other terminals are necessarily great. Although the state's expert (Ev. Ludlam, 1274-1275) claims that some of the terminal expense is affected by the length of the haul because trains with long hauls pass through the terminals, yet he admits (Ev. Ludlam, 1355, 1358, 1359) that the local terminal expense is three times as great as the terminal expense of the freight passing through. The result of his contention is that so much of the terminal expense as is not affected by the length of the haul should not be computed upon a ton mile basis. The state's expert says (Ev. Ludlam, 1274, 1276, 1280) that it should be upon a ton, as distinguished from a ton mile basis, that the valuation upon which a return is to be had should be upon a gross revenue basis (*id.*, 1153, 1154), that rentals should be divided (*id.*, 1322, 1428) upon the basis of the ton miles moving over the rented track, as distinguished from the ton mile basis applicable to the entire state, and that as between passenger and freight business interest should be divided according to net revenue (*id.*, 1429) and

not, as decided by the courts (*C. M. & St. P. Ry. Co.* v. *Smith*, 110 Fed. Rep., 473, 475) upon gross revenue, but as between state and interstate freight (*id.* 1281, 1282) a ton basis. Lack of uniformity is necessarily the result of the state's contention, for the *gross* revenue basis would have to be applied to valuation, *net* revenue to interest as between passenger and freight business, the ton basis to such portion of the terminal expenses as was not affected by the length of haul, and as to interest so far as it concerns state and interstate freight, the ton mile basis for the entire state to all other expenses, excepting rentals, to which should be applied the basis of ton miles only which moved over the rented track. The contention of complainant is that the simple, certain, uniform method is the revenue basis, and such is the method in general use.

(3) The many reasons given by the expert witnesses as to why expenses should be divided according to revenue are not attempted to be here repeated.

(4) It is absolutely impossible to reliably compare state and interstate freight expenses upon a ton mile basis unless the character and amount of tonnage in each shipment and the cars in each train be taken into consideration. The waste space and loss of tonnage, and the loss of cars in a train make necessary elements to be considered in the comparison. Especially is this true upon the Missouri Pacific Railway, where the Missouri retail dealers have the most of their shipments to and from Kansas City and St. Louis, all of which is state business. Whenever at one local point a shipment is unloaded, there is waste space left, though the train may move on in distributing its loads. The same thing is true in bringing loads from the country into those cities. This is not limited to freight in less than carload lots, because in carload lots the cars are distributed and taken into the train at different points, so that between those different points the number of cars in a train may differ, and necessarily the amount of tonnage carried. So in state business the waste tonnage in the cars carried is very much greater than in the interstate business. The amount of interstate traffic in parcels is trifling compared to the volume of interstate business, whereas a very large portion of the state business is of that character.

(5) In handling state and interstate business, and local and through trains, of the elements of expense to be considered, the following are some where no aid can be derived

from the comparison made upon a ton mile basis: The time consumed between stations; additional fuel consumed at each station, where there is a stop; wear and tear of the locomotive and cars from increased stops and from shifting cars from main to side tracks; wages of employes at intermediate stations; cost of insurance; cost of billing and handling freight at terminals.

(6) So, while the waste space, loss of tonnage, loss in cars carried, terminal expense and other matters mentioned have an important bearing upon the question of the expense as between state and interstate business, not one of such items is affected by the length of haul. Upon the other hand, the shortness of the haul is one of the elements which makes it cost more to do state than interstate business. Therefore, a comparison upon a ton mile basis, the foundation of which is *length* of haul would be improper."

(f) This document was adopted and approved in Exhibit 41 in the Burlington case. Many additional reasons were therein given by Mr. Sturgis, an eminent expert (Rec., 1441-1445).

(g) The auditors of the eighteen railroads adopted the revenue basis, it being the method used by all railroads where it has been necessary to divide expenses as between state and interstate.

(h) The best railway experts in the world favored it, giving many reasons for their views in addition to those set forth in the Missouri Pacific Exhibit 55 and Burlington Exhibit 41. Among these experts so testifying were Carl Gray, Vice-president and General Manager of the Frisco (Ev. Frisco Case, Rec., 3929-3939, Cross Ex. Rec., 3940-4034); C. J. McPherson, Manager of the Missouri Pacific (Rec., 4288-4307); W. T. Tyler, General Superintendent Frisco (Rec., 4099-4112); W. H. Whittenton, Superintendent Chicago, Rock Island & Pacific (Rec., 4140-4142) J. W. Kendrick, Vice President of the Santa Fe (Rec., 4390-4399); William Ellis, Commerce Counsel of C., M. & St. P. (Rec., 4194-4220); B. H. Bethard, General Manager Missouri Pacific (Rec., 1821-1834); St. L. & S. F. Case (Rec., 4077-4098); W. B. Doddridge, Former General Manager Missouri Pacific

(Rec., 1568-1629; 1647-1654, 1769, 2273, 3814-3823); D. C. Buell, Assistant to President of Frisco, Missouri Pacific Case (Rec., 1794-1799); W. C. Stith, General Traffic Manager of Missouri Pacific (Rec., 1465-1542, 1770-1773); C. I. Sturgis, General Auditor of the C. B. & Q. Burlington Case, (Rec., 229-425, 707-709, 1078-1133; Howard Elliott, President Northern Pacific (Rec., 426-492); George B. Harris, President C., B. & Q. (Rec., 536-554); Darius Miller, General Traffic Manager of C. B. & Q. (Rec., 605-618); George H. Crosby, Assistant General Manager of C. B. & Q. (Rec., 555-558, 846-847).

No justice can be done the finding of the court below without reading all that these experts say upon the subject, and the many reasons given for their opinions.

7. THERE IS A SUBSTANTIAL EXTRA COST OF DOING STATE BUSINESS OVER INTERSTATE., WHICH SHOULD BE DEDUCTED FROM THE EARNINGS.

(a) That there is a substantial extra cost in doing state business over the interstate was decided below (Finding 15, Rec., 5296-5297; 168 Fed. Rep., 317) Judge McPherson holding that the state freight was in excess of fifty per cent more than the interstate, and that the state passenger was in excess of twenty-five per cent more than interstate.

(b) Mr. Justice Brewer (*Ames* v. *Union Pacific*, 64 Fed. Rep., 165, 184), and Mr. Justice Harlan (*Smyth* v. *Ames*, 169 U. S., 466, 469, 42 L. Ed., 819, 843) said this extra cost should be allowed, and took as sufficient for the purposes of that case, the estimate of the state's expert, of ten to twenty per cent more than the average cost of all business, which figures out the state about twenty-five to fifty per cent more than interstate expense.

Mr. Justice Brewer, in the South Dakota case (*C., M. & St. P.* v. *Tompkins*, 176 U. S., 167, 178, 179, 44 L. Ed., 417, 422), enlarged upon the idea and said that the amounts were dependent upon "the opinion of experts familiar with railroad business" which "cannot be disregarded."

In *C., M. & St. P.* v. *Keyes,* 91 Fed. Rep., 47, 53, 55, Judge Amidon, with the concurrence of Judge Thayer, allowed twice the cost of transportation expenses.

Judge Van Devanter (*In Re Arkansas Rates,* 163 Fed. Rep., 141, 142), said that the extra cost of freight was at least 100 per cent more and that of passenger at least 15 per cent more than interstate.

In *Buell* v. *C., M. & St. P.* (R. R. Commission of Wisconsin, p. 182), it was said:

> "It is fair to assume that the local passenger traffic as here understood is about ten per cent more costly than the through traffic."

Upon this subject, Judge Hook, in the Oklahoma case (*M., K. & T. R. Co.* v. *Love,* 177 Fed. Rep., 493, 499, 500), said:

> "Bearing on the division of expense is the much controverted question of extra cost of the local business as compared with the interstate. That the former costs much more than the latter is beyond doubt, but the difficulty is in applying the measure of difference. There is a general accord among practical railroad men of high standing and long experience that the cost of local freight traffic is from two to eight times as much as that of interstate traffic, and of local passenger traffic from twenty-five to fifty per cent more than the other. Though not altogether clear from the proofs here it is probable the difference mentioned in the freight traffic should not be fully applied in addition to a division on the revenue basis, for, as already seen, the difference finds expression in a measure in the relative revenue proportions themselves. A cogent reason for selecting the revenue basis in preference to the ton mile is that the former gives some effect to the known differences in cost. Nor is it altogether clear that the above ratio of extra cost of local freight traffic was intended by the witnesses to apply to all operating expenses as classified by the Interstate Commerce Commission and the Corporation Commission of Oklahoma. In *Southern Pacific* v. *Bartine,* (170 Fed., 725), the ratio of extra cost was confined to transportation expenses as distinguished from maintenance of way and structures, main-

tenance of equipment, and traffic and general expenses. But substantial factors of extra cost of local traffic may be found in other general accounts; for example, in the large cost of maintenance of yard tracks and sidings at terminals which is charged not as a transportation expense but to maintenance of way and structures. Those tracks sometimes constitute a fifth of the total mileage of a railroad.

The criticism of the formula for apportioning extra cost mentioned in the Arkansas case (161 Fed., 141), is due to a misconception. It appears the evidence in that case showed that on a revenue basis the cost of local freight traffic was double that of the interstate. The court gave a quick abstract rule for ascertaining the local cost, which, if applied to the facts there, would have been to double the local revenue, add it to the interstate revenue, ascertain what proportion the doubled amount bore to the total sum and then take that portion of the total cost of both. Although every algebraic or mathematical formula applied to the particular facts before that court would have brought the same result, it is earnestly argued here that if a given body of rates are confiscatory they must, under the rule of the Arkansas case, still be confiscatory though the revenue were doubled by doubling the rates—that confiscation would follow, however high the rates and great the revenue. Obviously, if revenue is doubled solely by increasing local rates there would be little, if any, increase in gross cost; if revenue is doubled by increase in volume of local traffic without changing rates the gross cost would probably increase, but not proportionately. But no such construction as contended for can be put upon the language of the court. If the formula given is to be applied to shifting conditions there should be a corresponding change in the numerical factors. This is obvious from a cursory reading of the opinion. A change in the amount of local revenue from whatever cause, rates or volume of traffic, would affect the relative cost predicated on the revenue basis, but whenever the ratio is found the apportionment can readily be made by employing it in the way indicated in the Arkansas case. The evidence here shows that, regarding average conditions and not exceptional instances, there is a substantial difference between interstate and local traffic in the ratio of cost to revenue. Particularly is this so as to freight. In other words, the apportionment of expense on a revenue basis does not adequately express the difference between them. It is not necessary to determine it definitely in view of the property of the companies and the statement that because of exceptional

circumstances the Atchison, Topeka & Santa Fe and the Gulf, Colorado & Santa Fe roads should be considered together."

Below (Rec., 5296; 168 Fed. Rep., 217, 348, 349) Judge McPherson said:

"That it costs more to carry either freight or passengers proportionately for a short than a long haul, is undoubtedly true, although all the elements are not more expensive. Local trains generally have poorer and older and cheaper cars and locomotives. But their speed is greater between stations. There are many stops. They carry proportionately much greater dead weight. They do much switching, and there are many delays. Their crews are paid more proportionately to distance and what is carried. The trains are daylight trains only. With freight the carload and number of cars are much the less, and from station to station grows less, and is largely made up of single parcels, boxes, and individual shipments from as many consignors to as many consignees, first put in station, and at the end of the trip into another station by the company. Usually there are two terminals, comprising an enormous amount of investments and expenses of the company. The local train is seldom loaded to the capacity of the engine, to the loss of much of the investment and expense. The clerk hire, selling tickets, issuing bills of lading, making expense accounts, and auditing and making records, are attended with like expense for the small and the large items. Many stations would be done away with but for local business. But from the great weight of the testimony, it can well be said that the ton mile is not reliable, and the revenue is more nearly correct, as showing that it costs more by twenty-five per cent. to carry passengers, and fifty per cent, to carry freight locally than it does when interstate. Generally speaking this is undoubtedly true. There are exceptions, one of which is shown by the Burlington with its three roads from St. Joseph, the one to Villisca, Iowa, another to Creston, Iowa, and a third to Chariton, Iowa. They are all interstate roads, each with two terminals, but each operating only local and daylight trains. The Wabash illustrates this with roads across the arbitrary state line between Missouri and Iowa. And there are other illustrations, but less noticeable, in the testimony."

In finding 7 (Rec., 5310), it was said:

"The expense of doing the state business over interstate

is greater for carrying freight by at least fifty per cent, and at least twenty-five per cent, for carrying passengers. Therefore this extra cost must be added to the expenses after they have been ascertained ~~upon a ton mile basis~~ so as to obtain the total expense. If the ton mile basis of division were adopted, the extra cost should also be added. This would require the use of another multiplier sufficient to bring the sum total of the state freight expense equal to that found herein, to actually represent the cost as shown by the evidence. Any apportionment of passenger expense upon the passenger mile basis would be unfair and unjust, although much more favorable to the companies than if made upon the revenue basis. All things considered, the evidence shows the cost of doing the different classes of state business as between state and interstate apportioned upon the revenue basis with added extra cost brings a result in these findings stated, which is fair and representative and just. The court finds, aside from the revenue basis, that the evidence shows the amount ascertained in each case as the expense and extra cost, is fair and justly represents the expense of doing each class of state business. The extra cost as to each complainant for doing the state business over interstate is more than fifty per cent. in case of freight, and more than twenty-five per cent. in case of passenger. This extra expense as thus found is considerably in excess of these figures and the figures used are adopted as the minimum. The sum total of this extra cost if ascertained according to the ton mile theory, would not be changed because it is a question of multiplication, and one multiplier or another must be used accordingly as the theory is adopted. The findings herein made on all the evidence represent in dollars the fair cost and expense fixed at a minimum."

(b) Here the experts clearly show that the extra cost of the state freight is three to five times as much as the interstate, and the passenger from twenty-five to 100 per cent.

(c) The following were the estimates of the railroad on extra cost of state business over interstate business, upon a revenue basis where not otherwise indicated:

Bethard, B. H., General Manager of the M. K. & T.: Passenger, 40 to 65 per cent (Frisco Case, Rec., 4078;) freight, 4 or 5 times (Mo. Pac. Case, Rec., 1824).

Buell, D. C., Assistant to President, St. L. & S. F.: Freight, 3 times (Mo. Pac. Case, Rec., 1794-1799).

Clark, H. G., General Superintendent of Mo. Pac.: Freight, 4 or 5 times on ton mile basis (Mo. Pac. Case, Rec., 1630-1631).

Crosby, Geo. H., Assistant General Traffic Manager, C., B. & Q.: Freight, 3 to 5 times (Burlington case, Rec., 583).

Doddridge, W. B., former General Manager of Mo. Pac.: Freight, ton mile theory, 4 times (Frisco case, Rec., 3822); freight, revenue theory, 2 times (Frisco case, Rec., 3822); freight, 3 to 6 times, 3 being minimum (Mo. Pac. case, Rec., 1584-1595, 1596); passenger, 25 per cent (Frisco case, Rec., 3827).

Elliott, Howard, President Nor. Pac.: Freight, 3 times (Burlington case, Rec., 427, 484); 6 times on ton mile basis (*id.*).

Ellis, Wm., Commerce Counsel, C., M. & St. P.: Passenger, 50 per cent very low (Frisco case, Rec., 4196); freight, a great deal more than 300 per cent (Frisco case, Rec., 4197).

Eustis, P. S., General Passenger Agent, C., B. & Q.: Passenger, 50 per cent (Frisco case, Rec., 4368).

Fisher, W. T., Head of Weighing and Inspection Dept., Mo. Pac.: Freight, 2 to 6 times (Mo. Pac. case, Rec., 1753).

Gray, Carl, Vice-President and General Manager, St., L. & S. F.: Passenger, 20 to 30 per cent (Frisco case, Rec., 3939); freight, 3 to 5 times (Frisco case, Rec., 3931).

Gray, Henry, Comptroller of the Northern Pacific: Freight, 7 to 11 1/2 times on ton mile basis (Burlington case, Rec., 620).

Harris, Geo. B., President, C., B. &. Q.: Freight, 3 to 5 times as much (Burlington case, Rec., 540).

Kendrick, J. W., Vice-President A., T. & S. F.: Passenger, 50 to 100 per cent. (Frisco case, Rec., 4399).

Kimbell, R. E., Assistant General Auditor, St. L. S. W. Ry.

Co. (Frisco case, Rec., 4177); freight by actual test, from three to four times (Exhibit 6482).

Miller, Darius, Traffic Manager, C., B. & Q.: Freight, 3 times, conservatively (Burlington case, Rec., 607).

Miller, Henry, General Manager, Wabash: Freight, 2 or 3 times, ton mile basis (Wabash case, Rec., 2829).

McPherson, C. J., Assistant General Manager, Missouri Pacific: Freight, several times (Frisco case, Rec., 4300); passenger more than 25 per cent. (Frisco case, Rec., 4307).

Peabody, James, Accountant, A., T. & S. F.: By actual test, freight over three times; passenger 47.2 per cent. (Frisco case, Rec., 4408).

Rainey, S. L., Assistant to General Manager, St., L. &. S. F.: Freight 3 or 4 times (Mo. Pac. case, Rec., 1837).

Rawn, I. G., General Manager, Ill. Cent.: Freight 3-1/2 times on ton mile basis (Burlington case, Rec., 572).

Stith, W. C., Traffic Manager, Mo. Pac.: 2-1/2 times for freight (Mo. Pac., case, Rec., 1496).

Stuart, J. S., General Manager, Erie R. R.: Freight, 5 to 8 times, ton mile basis (Burlington case, Rec., 691).

Sturgis, C. I., General Auditor, C., B. & Q.: Freight 3 to 7 times) Burlington case, Rec., 245-246, 397).

Tyler, W. T., General Superintendent, St., L. & S. F.: Freight 3 to 5 times (Frisco case, Rec., 4101); passenger, 35 to 40 per cent (Frisco case, Rec., *id*).

Whittenton, W. M., General Superintendent, C., R. I. & P.: Freight 3 to 6 times (Rec., 4142); passenger, 25 to 50 per cent. (Frisco case, Rec., 4140).

Willard, Daniel, General Manager, C., B. & Q.: Freight 3 times, ton mile basis (Burlington case, Rec., 494, 535).

The fact that some of the estimates of extra cost are upon the ton mile basis is no indication that the witness thought the equal division should be upon that basis. Howard Elliott (Burlington case, Rec., 484) and W. B. Doddridge (Frisco case, Rec., 3822) pointed out that it came to the same end, the total expense being that ascertained upon an equal basis plus the extra cost. If the ton mile theory be adopted the latter should be ascertained by using a higher multiple than would be used upon a revenue basis. The total expense will be the sum total of the two.

(d) That there was an extra cost was conceded in every table prepared by the state's experts. The leader (Ev. Taliaferro, Rec., 4593) thus testified:

"Q. The first statement is gotten up on the theory that the state business does not cost any more than the interstate? A. Yes, sir.

Q. According to your own statement, that is not a true theory, because you testified that the extra cost was at least 30 per cent. to 50 per cent.

Mr. Ladd: 20 per cent to 50 per cent.

Mr. Hagerman:

Q. 20 per cent to 50 per cent? A. Exhibit 2 contains calculations of that kind on the freight earnings basis. I do not mean for a minute that I do not think it costs more per ton mile to do the state than the interstate business.

Q. So the first column must not be taken to indicate, in your judgment, anything in the expense, as allowing for extra cost? A. That is right.

Q. And you have figured it at 30 per cent and at 50 per cent, is that right? A. Yes, sir. 30 per cent I believe is nearer right than any other figure I could name.

Q. In the previous hearings before the Master, Mr. Schofield, you said 50 per cent? A. I said 50 per cent as a maximum.

Q. But you never gave it as forcibly in that examination? A. I am sure you are mistaken about that, Mr. Hagerman.

Q. I will take it back then. A. You asked me here in Kansas City at one of the hearings, if we had ever worked out any figures that would enable me to come nearer than 50 per cent, and I said yes, that in certain figures in the

Burlington case, I think it was in the Burlington case, it worked out 35 and a fraction.

Q. That testimony is in the record, and we will see what is it. Your remembrance is that it was 50 per cent? A. No, sir.

Q. You did not say 30 per cent before, did you? A. No, sir.

Q. Or 20 per cent? A. No, sir, that is right.

Q. After working since 1906 on these cases, you have come to the conclusion that it ought to be from 20 per cent to 50 per cent? A. Yes, sir.

Q. Now that is upon the ton mile or revenue basis? A. That is upon the ton mile basis."

All the tables prepared by this expert (Exhibits 103-104-105, Rec., 5101, 5105) concede the extra cost.

(e) The extra cost actually found was (Finding 19, Rec., 5325) in state freight $484,129.29, and in the state passenger business $158,205.70. The same finding shows that without any extra cost, the actual return pon the state freight assignable value is 2.14 per cent, and upon the state passenger business 1.77 per cent. Thus without regard to any extra cost, the decree can be upheld, so that it is here unnecessary to further consider it.

8. Diminution in Freight Earnings.

The state freight rates were enjoined and the old rates kept in force. To ascertain the loss under the new laws, it was, of course, necessary to ascertain how much the earnings would have been diminished if the new rates had been charged. This diminution (Finding 19, Rec., 5324) was $112,533.71 and was agreed to by the experts (Ev. Sturgis, 4760, 4773; Ev. Taliaferro, Rec., 4772, Ex. 102, Rec., 5100). It is proper to deduct the amount thereof from the earnings (*Smyth* v. *Ames*, 169 U. S., 466, 565, 42 L. Ed., 819, 845; *Ames* v. *Union Pac. R. Co.*, 64 Fed. Rep., 165.) It is assumed that this is a matter which will be unquestioned.

9. FINAL RESULT.

(a) The final results are set forth in finding 19 (Rec., 5324). The net earnings, *without allowing for extra cost*, are, in state freight $146.030.09, or 2.14 per cent upon the assignable value. After paying interest $132,735.02 upon that part of the road devoted to the use of the state freight business, there would be left $13,295.07 for dividends. The passenger returns, without extra cost, were $124,754.71 or 1.77 per cent. upon the assignable value. The actual interest charge upon the assignable value was $135,424.89, so that the return was less than enough to pay the same.

(b) The total earnings in Missouri from every source, for the year ending June 30, 1908, were shown by the auditor of the C., B. & Q. (Ev. Sturgis, Rec., 4747; Exhibit 98, Rec., 5091) in detail to be $12,317,122.00, while the expenses (*id.*) were $10,-301,534.53, making the net income $2,015,587.47. The state's expert admitted these figures (Ev. Taliaferro, Rec., 4767-6773) to be correct. The total figures produced by him in his statement (Exhibits 103, 104, Rec., 5101, 5102) and those made (Rec., 201-206) by the four experts appointed by the court (Rec., 174) were all upon the same basis and adopted the same figures. These figures were adopted as part of finding 18 (Rec., 5315-5317.) The value of all the property in Missouri (Rec., 5311, Finding 11) was $53,172,907.83. Upon this sum the railroad company was entitled to receive a net return of six per cent or $3,190,374.46. It actually received $2,015,587.47, or only .037 per cent. The state conceded (Ev. Taliaferro, Rec., 4593) that it cost more to do the state than the interstate business. It manifestly follows that if the rates are confiscatory as a whole, the state part is also, as that part of the business is more expensive than the remainder.

The acts of the legislature in question account for the loss. They directly reduced the state freight earnings $112,533.71 (Finding 19, Rec., 5324), interstate (Ev. Sturgis, Rec., 4746)

$477,647.79, state passenger (Finding 14, Rec., 5313) $394,878.-77 and interstate $261,556.41, a total of $1,246,616.68, or more than .023 per cent upon the valuation of the entire property, $53-172,907.83 (Finding 11, Rec., 5311).

IV.

It is immaterial whether the railroad does or does not make up its losses by charging more or less to other traffic.

(a) It is suggested in the assignments of error that the decree was not as to the freight act warranted, because the losses under the act of 1907 could be made up by charging more upon traffic not affected thereby. Upon this subject Judge Philips (Appendix 8) said:

> "It is next objected that inasmuch as in determining the question of fact as to whether the maximum rate fixed by the legislature upon a specified article by the carload is oppressive or confiscatory of the property of the railroad company, we must take into consideration the whole earnings of the railroads; the amounts realized on all classes of shipments; so that while it may be true that the maximum rate fixed by the statute for shipping the particular specified articles may be low and independently considered, carriage could not be made without sacrifice or loss to the carrier, yet, in determining whether or not the railroads are to suffer as a result we must take into consideration all the rates established by the schedules approved by the railroad commissioners. In other words, as it seems to us to be the logical se- in this case, that the railroad commissioners, if they should ascertain that the maximum rates established by this act were too low, they might average their schedule by increasing the rates on other articles than those specified in the act of the legislature. In answer to that it occurs to the court that the bills in this case not only aver but that would be implied, that the existing rates specified in the schedules of carriage and which presumptively had the approval of the railroad commissioners are reasonable rates on all articles as heretofore understood, and that by 'reasonable rates' implies such as do not

unduly burden the shipper and such as do not unduly increase the income of the railroads. They are reasonable in the meaning of the constitution. The presumption, therefore, it seems to us, is to be indulged on this preliminary hearing, that those rates are to be maintained until changed by order of the railroad commissioners, and if, as the bill charges (and that fact is conceded on this hearing) that they cannot carry the articles specified in the legislative act of 1905 without loss, not only without profit to the railroad companies, but with an absolute loss for carrying it, would not cover the expenses of transportation, all things considered, for the purpose of this bill it is to be assumed that the rates existing on the other articles being reasonable, the presumption is that they will be maintained until it is altered by the railroad companies. I might observe in this connection that while it is true that the courts, in determining the question as to the reasonableness or unreasonableness of these rates prescribed by legislative acts, agree that a great many questions enter into the consideration and determination of that matter, that is the reasonable and unreasonableness, you must take into account what it earns on all articles carried and shipped, and that the result is to be drawn from an aggregation and consideration of all these matters. But the supreme court has never said, and in my humble judgment it never will say, that in order to justify and to validate the particular act of the legislature fixing the maximum rate upon particular articles of merchandise or the subjects of carriage, that they can, in its relation to other subject-matters of shipment, minimize the shipment on one article, by exaggerating the amount of charges on schedules on other articles. The underlying policy and inspiration of the inter-state commerce act itself is equity among all patrons of these public carriers. The carrier is prohibited from discriminating. He must be just alike to all comers, and in determining whether he deals justly and fairly and equitably with all patrons of the road consideration must always be had in the relation of one article shipped to another. For instance, we could not say that because a man wants to ship a carload of cattle from here to St. Louis that the car should be taken from here to St. Louis for a dollar a car, and then say as to a man who wanted to ship a half dozen cows or a half dozen sheep that they might take them for $10. That would be discrimination unquestionably among these shippers, and it cannot be that the law would uphold an Act of the Legislature that would justify discrimination in favor of one shipper as against the amount to be paid

by the other, in order to ascertain this equation, in determining whether the railroad can do this business without loss or not."

So Judge McPherson below (Rec., 5301-5302) said:

"Most of laymen and many lawyers believe that the question is whether the railway company as a system is earning sufficient revenue upon the value of the property of the system. They believe that if the Burlington, Santa Fe, Wabash, or any other railroad system is earning such money as will pay all charges and expenses including taxes and interest, with reasonable dividends to the stockholders, that state rates for state business must stand. Of course no one believes this who has given the slightest attention to the question. That precise question was before, and was decided by Justice Brewer, (64 Fed. Rep., 165,) and affirmed by the supreme court in the Nebraska case of *Smyth* v. *Ames*, (169 U. S. 466). The only question is as to Missouri rates, less expenses properly charged against the same. And if this balance does not leave sufficient to pay a reasonable return, the law is invalid. And if the railroad system of any company is earning more than a reasonable return by reason of interstate rates, which affect the people many times more than local rates, and if such interstate rates are too high, congress either acting alone or through a commission must make the corrections.

In *Central R. Co.* v. *Northhampton Co.*, 11 Northampton Co. Ct., 342, it was by Scott, P. J., said:

"Argument was addressed to me intended to establish by arithmetical demonstration that under the new rate the net profits of the company had not been greatly diminished by operation of the act; but if this can be sustained it falls short of meeting the essential fact asserted by proof that from intra-state passenger business (separate from freight, 220, p. 116), when the company reduced the fare to 2½ cents, and afterwards they were less than 6 per cent, on the investment, and that there was a deficit from the passenger traffic alone in Pennsylvania. 'What the company may choose voluntarily to do (sale of mileage books at reduced rates, furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the power to compel them to do. *Nor does it furnish a standard by which to*

measure the reasonableness of the matter enacted by the legislature. The action of the company upon its own volition, purely as a matter of internal administration, and in regard to the details of its business, which it has the right to change at any moment, furnishes no argument for the existence of a power in the legislature to pass a statute in relation to the same business imposing additional burdens upon the company.' *Lake Shore, Etc., Ry. Co.* v. *Smith,* 173 U. S., 684, 697. * * * Any comparison between the amount of dividends paid by the company in the years 1907 and 1908 is not only unsubstantial but irrelevant, as these are declared upon revenues from both passenger and freight earnings, etc., and embrace those from interstate traffic as well as intra-state. *Smyth* v. *Ames,* 169 U. S., 466. * * * The principal contention of the defendant has been to show from these exhibits that there has been no substantial diminution of plaintiff's receipts beyond those of for 1907 when the rate was fixed by the Board of Managers at 2½ cents. It may be so. If, however, by reasons of business competition they voluntarily elected to operate the passenger service in this state at a loss while pursuing mainly the chief purpose for which their road was constructed, in the transportation of coal, and for which the provisions of the original lease seems to have been designed, they cannot be compelled to adopt a legislative rate of carriage that produces the same result, and which they may not alter whenever, under changing industrial conditions, they believe it expedient."

In *M. K. & T. R. Co.* v. *Love,* 177 Fed. Rep., 493, 497, 498, Judge Hook thus adverted to the question:

"It is also urged that the bills of complaint are defective because they do not assail the freight rates separately. But the bills disclose the contrary, at least by express general allegations. Moreover, the rates in question should properly be considered as a body and in connection with the other freight rates of the companies not affected by the orders. Though the orders, save three modifications, were made successively, at different times during the year 1908, the rates prescribed constitute as much a single body as if embraced in one order. They affect from forty to fifty per cent of the local freight business, and cause an average reduction of about forty per cent of the prior rates applied to the same amount of traffic. Presumably the commission preserved a due relation among them so far as is practicable in such cases,

and there is no contention that the rates left untouched are relatively as low. When all the local freight earnings are considered an insufficient net return is clearly disclosed, and there is no difficulty in locating the cause."

(b) Here the other rates are subject to the order of the commission (Laws 1903, p. 131, Rec., 5-6; Appendix 1). Whether any order has been made in reference thereto or existing rates merely acquiesced in, leaving them in existence as the approved rates which are not to be changed, is wholly immaterial. Presumably, and for the purposes of this case, it must be said that the other rates are fair and just and the question is whether an unreasonably low rate may be fixed, so as to make the whole return confiscatory, and then be successfully defended upon the ground that the carrier might charge an unreasonably high rate against some one else, and so make up the loss. The question answers itself.

V.

The validity of the laws under which the rates were to be imposed.

The cross appeal seeks to review the action below in not holding the state laws to be void because:

First. They directly interfered with interstate commerce.

Second. They were confessedly confiscatory as to seventeen of the roads. It is then discrimination to enforce them as against the eighteenth.

Third. The two cent passenger rate law is unreasonable and discriminatory in exempting from its provisions roads forty-five miles or less in length. We consider these questions in their order.

If right therein the railroad company was entitled to an absolute injunction, even if the rates in question were not confiscatory. The questions probably arise upon the state's appeal. However, as the decree below provides for its suspension in case changes in the future make the rates reasonable, it was as a matter of precaution deemed proper to bring these questions here by the cross appeal.

(1) THE LAWS DIRECTLY AFFECT INTERSTATE COMMERCE.

(a) If as a matter of fact the laws directly affect interstate commerce they violate the federal constitution, which vests in Con-they violate the federal constitution, which vests in Congress exgress exclusively the regulation of interstate commerce. This in the Minnesota case (*Ex Parte Young*, 209 U. S., 123), was said to be "no frivolous question."

In *M. K. & T. R. Co.* v. *Love*, 177 Fed. Rep., 493, 498, Judge Hook said:

> "It is said by counsel for defendants that because of the higher range of local rates in Oklahoma, that state should be credited with a greater percentage of the interstate revenue than the mileage basis yields. That is but another way of asserting that local rates so directly affect interstate rates and the earnings therefrom that their influence may be measured and must be regarded by the courts. If that be true, then in every case every reduction by the state authorities of local rates directly and materially affects a subject-matter the regulation of which is vested in Congress. A similar contention was made in the Young case (209 U. S., 123, 145) and Mr. Justice Peckham, speaking for the court, said: 'The question is not, at any rate, frivolous.'"

Later, in the Minnesota case, the master reported that as a matter of fact, the state rates did affect interstate commerce; and that the adoption of the state rate at common border points, made it necessary to either reduce interstate rates or without their reduction maintain the state rates which, under the interstate commerce act, would be a discrimination. To properly appreciate this

report, a copy of which has been filed herein, it should be read as a whole. However, we quote therefrom a few extracts making plain the conclusion reached:

"A question of first importance is raised by the complainants in their contention that the prescribed rates discriminate against and operate as a regulation of interstate commerce, and a large amount of testimony has been offered by them bearing upon this phase of the cases. In their view upon the question so raised it is wholly immaterial whether the prescribed rates are reasonable or not. They contend that state-made rates must be made to conform to and not be relatively less than or unduly discriminate against interstate rates, and that the reasonableness of such interstate rates must be determined in the first instance by Congress or its administrative officers, the interstate commerce commission, acting under the interstate commerce statute. The orders of the Minnesota Commission and acts of the legislature are strictly limited to state commerce, so far as the language used is concerned, and in terms have no reference to commerce without the state, nor do they apparently seek to control interstate rates. It has been held, however, that 'if the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid whatever may have been the purpose for which it was enacted, and although the company may do both state and interstate business. Such is an established rule of constitutional construction, as the adjudged cases abundantly show.' (*Telegraph Co.* v. *Kansas,* 216 U. S., 1.)

It must be true that there cannot be a dual control in so important a regulation as the fixing of rates, the same being of vital importance to the continued existence of the company as a going concern, and if state and interstate rates must bear a certain relation to each other, the standard must be fixed by the sovereign power, the congress, which under the constitution is given power to regulate commerce among the states. A power enumerated in the constitution, with all the incidents thereof, is supreme and cannot be in any manner limited by state action. Subject to such power, so conceded to congress, all rights are reserved to the state, including the right to regulate its internal commerce. 'It needs no argument to show that the commerce with foreign nations and between the states which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal

with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation.' *Gloucested Ferry Co.* v. *Pennsylvania,* 114 U. S., 196.)

It is now settled in this court that a state has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce." (*Stone* v. *Farmers Loan & Trust Co.,* 116 U. S., 307.) In *Ames* v. *Union Pacific R. R. Co.,* (64 Fed. Rep., p. 172), where this question seems to have been raised by counsel for the defendant, Mr. Justice Brewer said:

'Neither can I understand how the reduction of local rates, as a matter of law, interferes with interstate rates. It is true the companies may, for their own convenience, to secure business, or for any other reason, rearrange their interstate rates, and make them conform to the local rates prescribed by the statute, but surely there is no legal compulsion. The statute of the state does not work a change in interstate rates, any more than an act of congress prescribing interstate rates would legally work a change in local rates. Railroad companies cannot plead their own convenience, or the effects of competition between themselves and other companies, in restraint of the otherwise undeniable power of the state.'

On appeal, this statement of the law, not in form but in effect, is approved by Justice Harlan.

The matter of discrimination, in the instant cases made so prominent, does not seem to have been called to the attention of the court, nor does there seem to have been any evidence in the case bearing upon the question. Here the complainants do not claim that 'as a matter of law' local rates necessarily interfere with interstate rates or that companies can "plead their own convenience or the effect of competition between themselves and other companies in restraint of the otherwise undeniable power of the State.' What they do insist is that the evidence presented in these cases differentiates them from the Ames case and shows that the prescribed rates if observed are so far-reaching in their effect as to compel disobedience to the inhibitions of the interstate commerce act against discrimination, which in terms forbids a carrier 'to subject any particular * * * locality * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever,' and that such discrimination, enforced as it is by state action, if not denounced by the act of congress, is violative of the commerce

clause of the constitution, having in mind the purposes of such provision and the historical conditions giving rise to its adoption. The state claims that the above section of the Federal act referred to does not prohibit discrimination brought about in conducting state commerce because of the proviso appended to the first section of the act, as follows:

'Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, storage or handling of property wholly within one state and not shipped to or from a foreign country or to any state or territory, as aforesaid.' This would seem to be in effect a declaration that the act is not intended to apply to any subject outside of Federal control. The primary purpose of the act, as has been repeatedly held, is to prevent discrimination, and it would seem to be a misconstruction of the proviso to hold that it authorized or permitted in its most vicious form that which in another form it so strictly inhibits, especially in view of the fact that here can be no question of the competency of congress to prevent discrimination between interstate localities. It certainly should not be construed as conferring upon a state power or permission to so regulate commerce within its borders as to hamper or be a burden upon interstate commerce and operate as an unrighteous discrimination against localities in other states. It was such discrimination which gave rise to the commerce clause of the constitution and it is not to be supposed that congress intended to give the carrier, or the state acting upon it, a free hand with respect to state commerce between the states. It could not do so if it would. A state has no right to burden interstate commerce for the benefit of its own business enterprises or to subject it to 'any undue or unreasonable prejudice or disadvantage in any respect whatsoever.' 'It is of the last importance that the freedom of interstate commerce shall not be trammeled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the constitution and laws of the United States. While the general rights of the states to regulate their strictly domestic affairs is fundamental in our constitutional system and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the general government and not in hostility to rights secured by the supreme law of the land. (*Western Union Telegraph Co.* v. *Kansas*, 216 U. S. That such burden may be imposed by state rate regulation is well illustrated in the case of *Saunders & Com-*

pany v. *Southern Express Company*, decided by the Interstate State Commerce Commission, January 10, 1910, (Opinion No. 1278), where the facts showed that certain state rates put in by the Alabama railroad commission under legislative authority, discriminated directly and substantially in favor of the city of Mobile, Alabama, against the city of Pensacola, Florida. In delivering its opinion the commission says: 'The carriage of traffic by a common carrier for one community or one set of shippers at less than it carries the same traffic for a like distance, and under substantially similar transportation conditions, for another community or another set of shippers, is not only in contravention of fundamental right and justice but is essentially iniquitous. If such a discrimination is practiced by a common carrier as between communities or different sets of shippers within the same state and on traffic moving only within the state, redress may usually be had under the state laws. On the other hand, if an interstate carrier is guilty of such a discrimination with respect to interstate traffic, redress may be had under the act to regulate commerce. But when a carrier, as in this case, serves two communities similarly situated, by hauling the same traffic under similar conditions from a point of origin to destinations in the same state and also to the same destinations from an interstate point of origin, it is not altogether clear that existing legislation affords redress against a discrimination, as between the two points, when resulting from an order by the state commission. But unless some such power is lodged somewhere under appropriate legislation, it is evident that state-made rates, if established in pursuance of a narrow or selfish local policy, may not only hinder and harm and burden interstate traffic and interstate interests, but may, if adjusted with that end in view, take from a point in another state a business that naturally belongs to that point or in which it is entitled at least to participate, on the basis of equal rates and equal opportunity.* * * The defendant is one concern and one instrument of commerce operating through and across those invisible lines that separate the several states from one another. It has but one corps of officers and employees and but one equipment. Its only object is to serve all the shippers in the territory through which it passes. That object is legitimately affected only when it serves its whole constituent public upon substantially similar terms when the conditions are substantially similar. If it voluntarily makes a distinction between traffic that moves from a point in one state to a point in another state and traffic that moves between points in the

same state, and gives to the state traffic lower rates than to the interstate traffic moving under substantially similar conditions, it imposes upon the latter a burden that it ought not justly to bear, and it discriminates against one community in favor of another. The same burden and discrimination follow if instead of voluntarily so adjusting its rates it is compelled so to adjust them by the action of a state commission. It may be that this anomaly in transportation necessarily results from our dual system of government and that a remedy is beyond reach without some amendment to the national constitution. On principle it is clear that a carrier operating through two or more states is but one vehicle of commerce, and all traffic moved by it, whether state or interstate, ought, when the general transportation conditions are the same, to bear its just proportion of the cost of operation and ought to yield no more and no less than its just proportion of the revenues of the carrier. Any other theory is fundamentally inequitable, illogical and unreasonable. It may be, but on that point we express no opinion, that the congress may constiutionally protect interstate commerce, as well as the carriers that are engaged in interstate transportation, by requiring that any state traffic moved by such a carrier shall bear its just proportion of the cost of operation and yield its proper proportion of profit to the carrier; and that with such an end in view it may authorize this commission to fix minimum rates, at least, for state traffic when moved by carriers engaged also in interstate transportation; or that it may provide that no carrier engaged in the interstate transportation of passengers or property may at the same time carry state traffic at rates that are less than the rates exacted by it for interstate carriage of like distance and under like transportation conditions. It has, however, not attempted any such legislation, and whether such an enactment would stand the test of scrutiny by the courts under the constitution as it now stands, and if so, whether it would be desirable from the standpoint of a broad public policy, are questions that must ultimately be determined by the legislative power and therefore cannot profitably be discussed by the commission in this proceeding.'

The commission were of opinion that the federal law under which they derived their power did not justify them in interfering with the state-made rates although they found it operated as a burden upon interstate traffic. In view of this finding it would seem to have been competent for the commission to require the carrier to ignore the order of the state commission on the ground that in its operation it violated the

commerce clause of the constitution. In a matter of so much doubt, however, it was a proper exercise of administrative discretion not to compel the carrier to disregard the state-made rate until its validity and their own power in the premises had been judicially determined, and especially is this true in view of the fact that in that case the state was not represented and the action of its commission would have been condemned without a hearing on the part of the state. In the cases before the master, the validity of the prescribed rates is directly in question, not merely as a matter of legal construction, but upon voluminous evidence, with all interested parties present, and the force and effect of the federal act and of the commerce clause can be determined in the light of the facts disclosed by such evidence. The facts in this regard are as follows: * * * 'It is wholly impossible for carriers situated as are the Great Northern, Northern Pacific and Minneapolis & St. Louis companies to maintain materially lower rates or a materially lower basis of rates or a different classification of subjects of transportation, or a different relation between rates for different classes of merchandise, for traffic wholly within Minnesota than for that between Minnesota and any of its neighboring states without unjust and undue discrimination in fact against the localities in the neghboring states, and without serious impairment of the volume of the interstate business of the carriers. Such lower basis of rates within Minnesota than between Minnesota and its neighboring states would result in the promotion of the growth and prosperity of localities in Minnesota at the expense of localities in neighboring states and the enchancement of the value of property in Minnesota and the serious impairment of the value of the property of all business men as well as of that of the carriers themselves in the neighboring states. Duluth and Superior, Grand Forks and East Grand Forks, Fargo and Moorhead, and Wahpeton and Breckenridge are so situated that each pair must be considered for the purpose of rate making as one locality. Both as a practical matter of the operation of a railroad and in order that undue and unjust discrimination as between the members of each pair may be avoided, each city of each pair must have rates equal to those accorded to the other city. If different rates, a different classification or a different basis of rates be lawfully prescribed by one regulating power in or out of one city of any pair to those prescribed by anothr regulating power in or out of the other city of the pair, the carriers serving them both must, in order to avoid undue and unjust discrimination in fact as between them as well as to preserve their

own power to transact business with each of them, adopt for each city the lower rates or basis of rates, or classification prescribed for either city. If it shall be necessary for the companies involved, in order that distrimination may be avoided, or in order that the companies may preserve the volume of their respective businesses in interstate transportation free from inpairment in volume, to install for their interstate business a basis of rate no higher than these respectively prescribed in the act and order complained of, and to extend the rates for their interstate long-haul business upon the principle provided in said act and order, the result will be substantial diminution in the revenues of the companies from their interstate business. * * * "The foregoing findings of facts with respect to the effects of the prescribed rates upon interstate traffic, established as they are by convincing and undisputed testimony and supported by the records and papers of the respective companies, are made without regard to the justness or otherwise in fact of the interstate rates so affected by such local rates, and as this can be determined only by congress or its administrative agent the interstate commerce commission, subject of course to the power of the court in a proper case to prevent confiscation or extortion, this court cannot, in this suit, determine the reasonableness or otherwise of such interstate rates. Before it can take cognizance thereof the question must have been presented to and passed upon by the proper federal tribunal created for that purpose. Until then, as they are legal, they must be accepted as reasonable and the state can take no action which will compel a modification thereof as a condition of doing interstate business. Interference with interstate commerce arises from the fact that to prevent discrimination the rates must be modified so as to correspond substantially with the state-made rates and from the further fact that interstate commerce cannot in general be maintained at all unless they are so modified. It was directly held in *Louisville & Nashville Railway Co.* v. *Eubank*, 184 U. S., 27, that the carrier cannot be compelled to adjust its interstate rates with reference to state-made rates, and since they must harmonize to prevent unjust discrimination and to enable the carrier to retain its interstate business, the state in its regulation of rates must do so with reference to their effect upon interstate commerce.

The facts as found establish conclusively that the state in the rates prescribed by it, is not kept within the limitations imposed upon it and has exceeded its constitutional powers in that such rates constitute a direct interference with and impose

a burden upon interstate commerce and effect unjust discrimination as between interstate localities.

If when this case was in the supreme court, and on the record then before it the court could say with reference to the claim of interference then made that the question is not, at any rate, frivolous, it would seem that on the facts here found to exist a conclusion that the prescribed rates operated as a direct interference with and a burden upon interstate commerce must be inevitable. It follows that the relief sought in these several suits must be granted."

(b) The question is wholly one of fact. Missouri, with its rivers on two sides of the state, is peculiarly situated geographically. This fact, with the course of its railway lines, presents this question as pointedly as could be done in any other state. The rivers upon its east and west boundaries are basing points as to all freight rates, state and interstate. Every interstate rate from the east to the west is made up of through rates to and from the rivers together with the local rates across the state. The C. B & Q. is the short line, with a mileage of 198 miles from Hannibal to St. Joseph. This distance measures the total rate between St. Louis and Kansas City, 280 miles, and St. Joseph, over 300 miles. Therefore the enormous business between St. Louis and Missouri river points, state and interstate, must be at the expense of carriage for 280 to 300 miles, and yet under a mileage law be paid only for 198 miles. A situation, less only in degree, exists as to all competitive points. In the passenger business the same principle applies because the short mileage between two points fixes the total mileage for which the two cent rate must be paid. The number of active progressive interior competitive points in the state, the location of the great cities upon the two boundaries of the state and the marked differences in the mileage of the roads prevents any company from receiving a full two cents per mile. There are other peculiar conditions in Missouri. The Missouri Pacific and Chicago Great Western between St. Joseph and Kansas City run from Missouri into Kansas and thence back into Missouri.

Though the origin and destination is in the state, still this is interstate carriage. (*Hanley* v. *K. C. So. R. Co.*, 187 U. S., 617; 47 L. Ed., 333.) Competing lines between the same points are wholly within the state. A similar situation exists as to the Frisco, Kansas City Southern and M. K. & T. between Kansas City and Joplin district. In each of these instances, if the competing carrier wholly in the state is compelled to adopt a low state rate, these interstate carriers between the same points must make a like reduction or obtain none of the business.

The case of the C. B. & Q. and Missouri Pacific between St. Joseph and St. Louis is illustrative. The two are great trunk lines crossing the state. The distances between the two points are substantially the same. The moment the C. B. & Q., running wholly in the state, puts in a state rate the Missouri Pacific, which in its interstate course passes out of and back into the state, must put in the same rate or else do none of the business. So the C. B. & Q. has lines from Atchison and Leavenworth, upon the Kansas side of the Missouri River, running across the state to the cities upon the Mississippi. Just across the border, it has the towns of East Leavenworth and Winthrop. When the state rates are fixed, they must be put in force from St. Joseph, East Leavenworth, Winthrop and Kansas City, Atchison and Leavenworth because they in location and in matter of distance are practically on a parity with the cities in Kansas. If the railroad company maintains its interstate rates from Atchison and Leavenworth, there is a clear discrimination if the lower state rates are maintained from St. Joseph, E. Leavenworth, Winthrop and Kansas City. The only way to avoid the discrimination is to adopt the same rates for state and interstate business from all these points. Thus it is plain that the state rates do affect the interstate, and the question is precisely the same as was decided by the master in the Minnesota case.

The facts and reasons supporting statements are outlined in the masterly article of Robert Mather, Exhibit 4, in the Frisco

case, (Rec., 4806-4820) and the undisputed evidence of C. Haile (Frisco case, Rec., 4035-4076), Geo. H. Crosby (Burlington case, Rec., 555-558, 578-604, 846-847), Darius Miller (id., 605-618) and W. C. Stith (Missouri Pacific case, Rec., 1543, 1770-1773; A. D. Bethard, Rec., 4078-4098; J. A. Kendrick, Rec., 4390-4403.) The states expert practically conceded these facts. (Ev. Taliaferro, Rec., 4584-4586.)

The railroad maps (Rec., 2365-4897) show the location of the border cities,, and the report of the board of equalization (Rec., 5190-5224) shows the points from and to which the C. B. & Q. lines run.

(c) The court below thus found (Finding 3, Rec., 5306, 5307) the facts:

> "Both from a geographical and railway standpoint Missouri is situated differently from the other states of the Union, there only being two or three other states that have a resemblance to it in these particulars, and each of them in a lesser degree. This is so because the Mississippi is its boundary on the east all the distance. From a railroad standpoint the Missouri River is its boundary line on the west, although physically the Missouri River is only the western boundary line from the northwest corner of the state about half way to the southwest corner. But at the half way point, namely, Kansas City, the river turns directly to the east, and continues its way to the Mississippi River. In its production, business and commerce all that part of Missouri to the north of the Missouri River is practically like the south half of Iowa, the country districts producing large quantities of live stock and grain for the market as well as much bituminous coal. The south half of Missouri is entirely different. The amount of grain and live stock is much less than in the north half of the state. But the south half has a large amount of timber, stone, lime, lead, zinc, iron, and fruits. St. Louis on the east is a city of nearly a million people, Kansas City on the west nearly half as many, while St. Joseph has more than one hundred and twenty-five thousand people. These three cities carry on large manufacturing interests. The grain, live stock, and packing house interests at Kansas City and St. Joseph are enormous. For a third of a century or more for reasons

which need not be repeated, rates from the East were fixed to the Mississippi River, and later on, from thence to the Missouri River. The interstate rates either in or out were the one plus the other. It was the same from the West. It was likewise the same for the trans-state business going in either direction. Such is the method existing today. This brought about the fact which for years has existed and exists today, that the short line of road between the two rivers fixes the freight rates. To illustrate, the Burlington road is the short line between the rivers, being 198 miles from Hannibal to St. Joseph, and the same distance, within a few miles, to Kansas City. The roads between Kansas City and St. Louis, and there are four at least of them, including the Burlington, is an average distance of nearly 300 miles, but some of the roads being fifty miles or more farther between the points than the others. This brings about the fact that all freight rates between any one point on the one river and any point on the other river are the same as the rate from Hannibal to St. Joseph over the Burlington line. That is to say, the freight rates on any road regardless of distance are the same between St. Louis and either Kansas City or St. Joseph that they are between Hannibal and St. Joseph over the Burlington line. This has given the three cities of St. Louis, Kansas City, and St. Joseph great advantages over other points. Competent persons say that to change this system will work irreparable harm to the three cities named, as well as to all other places within the state, by driving both the jobbing and manufacturing business to seaboard points. As to this no finding is made nor opinion expressed because it is believed to be a matter of policy upon which this Court in these cases should express no opinion. As to the passenger rates, by reason of competition the fare is the same between Kansas City and St. Louis, the shorter line fixing the rates, thereby compelling the longer road to be at much expense without remuneration. This is likewise true as to all competitive points. As to the foregoing question of rates and fares, there is no United States statute governing the same, and there is no Missouri statute upon the subject except the two statutes questioned by the bills, one dealing with certain commodities per car per distance, and the other fixing the passenger fares at two cents. Aside from these two statutes, and as to any bearing they have as to charges between the two rivers, the conditions named have been brought about and exist today by reason of a long time custom and by reason of transportation, actual and probable, upon the two rivers. Still

further bearing on the question are the following facts: Joplin is a city in the southwestern part of the state of more than twenty-five thousand people. There are a number of towns adjacent thereto, giving that county (Jasper) a population of 200,000 people. It is a very large mining district of lead and zinc. Between Kansas City and Joplin three of complainants herein have railroads. The Missouri Pacific at all points between the said places is within the state. Each of the other two between said points is partly without the state, starting within and going out and coming back, thereby making it interstate business as to two of the roads between Kansas City and the Joplin district. Between Kansas City and St. Joseph, four roads do the business. The Missouri Pacific and Chicago Great Western is each part of the distance within the State of Kansas, while the Burlington and St. Joseph & Grand Island Company is each wholly within the state of Missouri between the two cities. Between St. Joseph and St. Louis two of complainants do practically all the business, which is very large in both passenger and freight. These are the Burlington and Missouri Pacific. Between said cities the Burlington line is wholly within the state. But the Missouri Pacific line is partly within the state of Kansas, crossing the Missouri River at Atchison and coming back into the state at Kansas City. On the foregoing facts the finding is that the short line between two competitive points necessarily fixes the rate, and the Missouri statutory rates under the statutes in question fix the rates between the cities named. But this is so solely because of the geographical location of cities and railroads, and competition, and long time custom. It is not so either because of a statute or any judicial determination by any of the courts of Missouri.

(d) It will be observed that the learned judge below admitted the facts except that he said nothing as to the feature of discrimination. He concluded as a matter of law that the legislation was good because it did not purport upon its face to apply to state rates. He overlooked entirely the view adopted by the master in the Minnesota case, that to maintain the state rate, would create a discrimination which could only be avoided by reducing the interstate rate. The learned judge was clearly wrong in his view. *Western Union Telegraph Co.* v. *Coleman*, 216 U. S. 1, 30 Sup. Ct. Rep. 190, 197, 198 reviews all the authorities

as to when state laws affect interstate, and the conclusion reached is thus stated by Mr. Justice Harlan:

> "But it is said that none of the authorities cited are pertinent to the present case, because the state *expressly disclaims any purpose by the statute in question to obstruct or embarrass interstate commerce,* but seeks only to prevent the telegraph company from entering the field of domestic business in Kansas without its consent, and without conforming to the requirements of its statute. But the disavowal by the state of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute, as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. *This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things.* Such is an established rule of constitutional construction, as the adjudged cases abundantly show."

The learned justice then proceeded to thus review the cases:

> "In *Henderson* v. *New York* (*Henderson* v. *Wickham*), 92 U. S. 259, 268, 23 L. Ed. 543, 547, which involved the the question whether a statute of New York was, in any real sense, a regulation of commerce with foreign nations, the court said that, *in whatever language a statute may be framed,* its purpose must be determined by its natural and reasonable effect. In *Mugler* v. *Kansas,* 123 U. S., 623, 661, 31 L. Ed. 205, 210, 8 Sup Ct. Rep. 273, it was said that the courts, when determining whether a statute is consistent with the fundamental law, must not deem themselves *"bound by mere forms, nor are they to be misled by mere pretenses.* They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority." In *Lyng* v. *Michigan,* 135 U. S., 161, 166, 34 L. Ed., 150, 153, 3 Inters. Com. Rep., 143, 10 Sup. Ct. Rep., 725, it was adjudged that a state could not lay a tax on interstate commerce 'in any form

whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.' In *Robbins* v. *Taxing Dist.* 120 U. S. 489, 497, 30 L. Ed. 694, 697, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, it was attempted to support a local regulation about drummers upon the ground that no discrimination was made between domestic and foreign drummers,—that they were all taxed alike. But that device or form of taxation did not prevail, the court saying: 'That does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the state.' In *Minnesota* v. *Barber*, 136 U. S. 313, 319, 326, 34 L. Ed. 455, 457, 460, 3 Inters Com. Rep. 185, 10 Sup. Ct. Rep. 862, the particular statute there assailed as repugnant to the Constitution of the United States was not saved by the fact that it was applicable to citizens of all the state, including citizens of the state which enacted it. This court said: 'There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, *by its necessary operation*, be destructive of rights granted or secured by the constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void.' It was further said in that case' that a statute may, upon its face, apply equally to the people of all the states, and yet be a regulation of interstate commerce which a state may not establish. A burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statute.'

In *Brimmer* v. *Rebman*, 138 U. S., 78, 81, 34, L. Ed. 862, 863, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213, the question arose as to the validity of a Virginia statute making it unlawful to offer for sale, within the limits of that state, 'any fresh meats (beef, veal, or mutton) which shall have been slaughtered 100 miles or over from the place at which it is offered for sale until and except it has been inspected and approved' as provided in the statute. The preamble of the statute recited that unwholesome meats were being offered for sale in Virginia. Such recital was

held not to conclude the question as to the conformity of the statute with the constitution. Despite the avowal by the state that its object, by the statute, was to prevent the offering of unwholesome meats for sale in Virginia, this court adjudged it to be unconstitutional saying: 'Is the statute now before us liable to the objection that, by its necessary operation, it interferes with the enjoyment of rights granted or secured by the constitution? This question admits of but one answer. * * * The fees exacted under the Virginia statute for the inspection of beef, veal, and mutton, the product of animals slaughtered 100 miles or more from the place of sale, are, in reality, a tax; and "a discriminating tax, imposed by a state, operating to the disadvantage of the products of other states when introduced into the first-mentioned state, is, in effect, a regulation in restraint of commerce among the states, and as such is a usurpation of the powers conferred by the constitution upon the Congress of the United States." *Walling* v. *Michigan*, 116 U. S., 446 455, 29 L. Ed. 691, 694, 6 Sup. Ct. Rep. 454. Nor can this statute be brought into harmony with the constitution by the circumstances that it purports to apply alike to the citizens of all the state, including Virginia; for "a burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statutes." *Minnesota* v. *Barber*, 136 U. S. 313, 319, 34 L. Ed. 455, 457, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Robbins* v. *Taxing Dist.* 120 U. S. 489, 497, 30 L. Ed. 694, 697, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592. If the object of Virginia had been to obstruct the bringing into that state, for use as human food, of all beef, veal, and mutton, however wholesome, from animals slaughtered in distant states, that object will be accomplished if the state before us be enforced."

In Galveston, *H.* & *T. R. Co.* v. *Texas*, 210 U. S. 217, 227, 52 L. Ed. 1031, 1037, Mr. Justice Holmes said:

"Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

The Western Union case was subsequently followed and applied in *Pullman Co.* v. *Kansas,* 30 Sup. Ct. Rep., 232, 216. U. S., 56 and *International Book Co.* v. *Pigg,* 30 Sup. Ct., Rep., 481, 487, 217 U. S., 91. In the latter case Mr. Justice Harlan said:

> "It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business."

In *Louisville & Nashville R. R. Co.* v. *Eubank,* 184 U. S. 27, 46 L. Ed., 416, this court passed upon the question of the validity of a constitutional provision of the state of Kentucky regulating rates for the transportation of merchandise within that sate. The effect of that provision upon the interstate business of the railroad company was strikingly similar to the effect of a reduction of the rates in Missouri upon the interstate business of several of the railroads involved in this controversy. In the opinion holding the regulation void, the court clearly and decisively announced the tests by which the validity or invalidity of any state laws reducing the rates to be charged for the transportation of freight or passengers in Missouri is to be determined. The Kentucky provision was to the effect that it was unlawful for a carrier to charge more for a short haul than for a longer haul, under similar conditions, the shorter haul being included in the longer. The Louisville & Nashville Company charged for the transportation of tobacco from Nashville, Tennessee, to Louisville, Kentucky, twelve cents per one hundred pounds, while it charged for like transportation from Franklin, Kentucky, to Louisville in the same state, twenty-five cents per hundred pounds. Franklin was a station on the line of the company between Nashville and Louisville. The Kentucky court held that the act of the company in charging more from Franklin to Louisville than from Nashville to Louisville, violated the constitutional provision. It appeared that the lower rate from Nashville to Louisville was due to water competition; that unless to-

bacco was carried at a twelve-cent rate between those cities, the railroad could not get the business. Hence, under the constitutional provision, as construed by the Kentucky court, the railroad was under the commercial necessity of either losing the interstate business from Nashville to Louisville or lowering all its rates in Kentucky to get it.

In the opinion the court referred to the foregoing facts and said (page 40):

> "Is it an answer to this statement to say that the company can get this business by lowering its rates within the state to the same rate as charged from Nashville? Is it bound in order to secure this interstate commerce, to lower its rates all through the state? If it be, is not the law which accomplishes this result a direct interference by the state with interstate commerce? And if it do not lower its state rates and in consequence must raise its interstate rates in order to make its state rates valid, and thus must lose to an appreciable and important extent the interstate commerce, is not a law from which such necessary and direct consequences result, a regulation in effect by the state, of that commerce which ought to be free therefrom?"

The court held the constitutional provision invalid because it amounted to a regulation of interstate commerce, whether its effect was to compel the carrier to lose interstate commerce or its effect was to compel the carrier to readjust its nterstate rates with reference to the local rates within the state. The opinion clearly states the tests by which it determined that the provision in question effected a direct regulation of commerce.

One test was stated as follows (p. 36):

> "We fully recognize the rule that the effect of a state constitutional provision or of any state legislation upon interstate commerce must be direct and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the state to a point within it, or from a point within to a point without

the state, interstate commerce is thereby affected, and may be thereby to a certain extent directly regulated and in that event the effect of the provision is direct and important and not a mere incident."

The second test was as follows (p. 41):

"But the fact which vitiates the provision is that it compels the carrier to regulate, adjust or fix his interstate rates with some reference at least to his rates within the state, thus enabling the state by constitutional provision or by legislation to directly affect, and in that way to regulate, to some extent the inter-state commerce of the carrier, which power of regulation the constitution of the United States gives to the Federal Congress."

The third test was stated as follows (pp. 41-42):

"It seems also to be thought that there is no regulation of commerce, provided it is not interfered with or regulated in all ways by which transportation of commodities between interstate localities may be accomplished; that if the commodity (tobacco in this case) can be transported by any other means or route, or by any other individual or corporation than the one affected by the regulation, commerce is not regulated within the constitutional meaning. On the contrary, it seems quite clear that any law which in its *direct result regulates the interstate transportation of a single individual carrier, or company of carriers, violates the provision in question;* that it is no answer to say the commodity can still be transported by another carrier or by water instead of rail, so long as the direct effect of the state legislation is to regulate the transportation of the commodity by a particular means, by rail instead of by water, or by a particular individual or company."

It may be said that the conclusion reached confines the powers of states over railroad rates within narrow limits. This may be admitted, but in nowise affects the soundness of the argument or the correctness of the conclusion. That this effect of the application of the principles announced in the Eubank case was before the court and fully understood when the case was decided,

is evident from the sentence in the dissenting opinion filed in that case by Mr. Justice Brewer for himself and Mr. Justice Gray. In the dissenting opinion, it was said (p. 47):

> "It does not seem to me that much is left of state control over local rates."

In view of these authorities, it seems hardly necessary to further press the suggestion that if, as a matter of fact, the state's statutory rate does affect the interstate, it must fall no matter what language is used in the state enactment.

(e) The facts are undisputed. The state has never yet and probably never will discuss this question. Its expert admitted the facts (Rec., 4584-4586). The view adopted by the master, in the Minnesota case, is of striking force and is precisely applicable to this situation. Here the C. B. & Q. has lines crossing Missouri, starting at Leavenworth and Atchison, Kansas. It has stations just across the river in Missouri. It has termini at St. Joseph and Kansas City, where the conditions are extermini at St. Joseph and Kansas, where the conditions are exactly the same as at Leavenworth and Atchison and the distances from the Missouri River stations are practically the same. To adopt a lower state rate from Missouri river points necessarily discriminates. The only way to avoid the discrimination is to take out the state rate, as all roads maintain joint tariffs. The same situation exists at all border cities. So it is at East St. Louis and St. Louis, Quincy and East Quincy, Kansas City, Kansas and Kansas City, Missouri.

One of the leading purposes of the interstate commerce act is "to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions" (*Interstate Com. Co.* v. *B. & O. R. Co.*, 145 U. S., 263; 36 L. Ed., 699; *Interstate Com. Com.* v. *C. G. W. R. Co.*, 209 U. S., 108; 52 L. Ed., 705). When a regulation is made relative to interstate com-

merce and a state provision exists in reference thereto, "the state statute must give way" (*Gulf, Etc., R. Co.* v. *Hefley*, 158 U. S., 98; 39 L. Ed., 910), for "it is enough that the two statutes operating upon the same subject-matter prescribe different rules. In such case one must yield, and that one is the state law" (*id.*). When there is a congressional enactment "not even a state, still less one of its artificial creature, can stand in the way of its enforcement. If it were otherwise, the government and its laws might be prostrated at the feet of local authority" (*Northern Securities Co.* v. *U. S.*, 193 U. S., 333, 48 L. Ed., 677).

Here congress has by its interstate commerce act prohibited unjust discriminations in the renditions of like services under similar circumstances and conditions, and the only question is whether there would be such discrimination when the rate was required by the state law. The act of congress must be so liberally construed as to stamp out all efforts to evade its spirit. This court has spoken in no uncertain terms upon this subject (*New Haven Elec. R. Co.* v. *Interstate Com. Com.*, 200 U. S., 361, 391 50 L. Ed., 515, 521; *Armour Packing Co.* v. *U. S.*, 209 U. S., 56, 52 L. Ed., 681, 691). To say that the state may compel a railroad to make a discrimination is to destroy the efficacy of the act of congress. There is no reason for saying that congress only meant to forbid discriminations in interstate shipments. It meant to require equality to shippers and localities which could not be evaded by saying that the discrimination was only in state traffic. The result and injury would be the same in any case.

(f) This question is one that affects the rights of every railroad in the United States and involves the extent of the powers of the interstate commerce commission. The spirit of the interstate commerce act can never be carried out if state commissioners can fix rates which, in effect, destroy those made for interstate traffic. No greater or more important question was ever brought before a court. It should be considered only when nine judges

are upon the bench. It is reasonably certain that this case will be affirmed upon grounds other than this. If so, it will be unnecessary to consider this question. If, however, it does become material, then the argument thereof should be postponed until all the judges are here. The Minnesota case will be here by that time. Counsel and parties are therein entitled to argue it fully because there both sides went into it by testimony and every feature was fully developed. Here the state's counsel evaded the issue, so that it rests practically upon the undisputed facts, the states expert admitting the ultimate fact (Rec., 4584-4586). The question it too great and grave to be lightly considered and should be determined here only when necessary and when there is thrown thereon every light possible. Therefore the court will be requested to postpone a consideration of the question until the new judges are selected, and then to set it down for argument with the Minnesota case.

(2) THE LAWS ARE VOID IN PART AND HENCE VOID AS A WHOLE.

(a) It was upon this subject by Judge McPherson, (Opinion, Rec., 5294-5295, 168 Fed. Rep., 317) said:

> "It is urged that these statutes are void because they are not enforceable as to some of the railway companies within the state, and the claim is, that being void as to some, they are void as to all. It is conceded in argument that as to two roads, the St. Louis & Hannibal, and the Kansas City, Clinton & Springfield, the rates fixed are not compensatory. The state's experts agree to this. Usually statutes fixing rates for railroads to observe, classify the roads according to their earning power, and fix the highest rates for those earning the least. But this was not done, except that railroads of a length not greater than forty-five miles not owned nor leased nor controlled by a trunk line, may charge four cents per mile per passenger.
>
> The sole theory upon which rates are adjudged void can only be that the rates are not compensatory, and to so decree,

the court must have the complaint of each and every road making the claim. Complainants have recognized this by their counsel in bringing as many independent actions as there are railroads complaining. Whether there are any other railroads within the state than these eighteen complainants, neither the allegations of the pleadings nor the evidence show. Perhaps the court should take judicial notice of whether there are other road or not. Be this as it may, the court is not advised. I assume there are no other roads within the state than these eighteen."

(b) It is not denied that these laws directly affect a substantial portion of the traffic in the state thus carried upon the five roads running out of and thence back into this state. As to that part of the business they are void. If they had been so written they would have been discriminatory. The state's experts, in writing, admitted that the laws were confiscatory, upon any theory which may be adopted, so far as concerns the St. Louis & Hannibal and the Kansas City, Clinton & Springfield companies, two of the smaller roads which do not reach the great commercial centers of the state. By not appealing other cases the state admitted confiscation as to seventeen out of the eighteen. As the laws are general and on their face applicable to all companies alike, they must, as held in the employers' liability act (*Illinois Central R. Co.* v. *McKendree*, 203 U. S., 514, 51 L. Ed., 298, and the other cases hereinafter mentioned) stand or fall as to all. They cannot be enforced against one company unless enforced against all. If void as to one they are void as to all. That the authorities sustain these propositions plainly appears from a slight review thereof.

(c) If a law had been written that it should not apply to the seventeen roads, it would be discriminatory and invalid under the doctrine of *Cotting* v. *Godard*, 183 U. S., 79, 112; 46 L. Ed., 92, 110, and *Connolly* v. *Union Sewer Pipe Company*, 184 U. S., 540, 564; 46 L. Ed., 679, 691, 692. In the first of these cases Mr. Justice Brewer said:

"If once the door is opened to the affirmance of the proposition that a state may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guaranty of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made. This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

In the latter case Mr. Justice Harlan said:

"We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the state for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further extended argument to establish that position would seem to be unnecessary."

(d) The railroad and state's experts at the court's request (Rec., 174) jointly prepared a tabulation upon the different theories advanced as to all roads. It (Rec., 196, 302) as to two of the roads recites:

"Note: It is apparent from the results above shown that upon neither the revenue nor the ton-mile and passenger-mile theory of expenses, can any adequate return on the investment be earned. Further, the state has no figures to present for lack of passenger-mile and ton-mile. It would, therefore, seem to be unnecessary to continue making figures on the assumption of added costs of operation."

This is a confession that the laws, *general* in their character, cannot apply to these two companies. The failure to appeal seventeen cases makes the same admission as to them.

(e) It is manifest from the proofs that a substantial portion of the business of some of the roads in the state, becomes interstate by starting in, then passing out, and returning into the state. So that when as to a competing line the state rate is lowered, the interstate rate must likewise be lowered or the business is lost. This is true as to the Missouri Pacific and Chicago, Great Western between St. Joseph and Kansas City and the St. Louis & San Francisco, Kansas City Southern and Missouri, Kansas & Texas between Kansas City and Southwest Missouri. Therefore, at least to the extent of such business, the state rate does directly affect interstate commerce and is therefore void. Yet the law is general in its terms, making no exceptions.

It therefore appears that these laws, general in their terms, are confiscatory as to seventeeen of the roads, and invalid as to a substantial portion of the business of five roads because directly affecting interstate commerce. The question then is can a general law upon its face applicable to all, yet void as to some, be sustained as to the part? There is no room for discussion upon this subject.

As said (*U. S.* v. *Ju Toy*, 198 U. S., 253, 262; 49 L. Ed., 1040, 1044) by Mr. Justice Holmes:

> "An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again."

In *U. S.* v. *Reese*, 92 U. S., 214, 222, 23 L. Ed., 563, 566, Mr. Chief Justice Waite said:

> "We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be at-

tained by striking out or disregarding words that are in the section, but by inserting those that are not there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the constitution. The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. * * * To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

This case was approved, and the foregoing language quoted in *Trade Mark Cases*, 100 U. S., 82, 98-99; 25 L. Ed., 550, 553, where Mr. Justice Miller added:

"If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, namely: Make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under state law."

These cases were followed and applied in *Allen* v. *Louisiana*, 103 U. S., 80; 26 L. Ed., 318, and *Baldwin* v. *Franks*, 120 U. S., 678, 685-689; 30 L. Ed., 766, 768-769. They were also followed in *Poindexter* v. *Greenhow*, 114 U. S., 270, 305; 29 L. Ed., 185, 197, where Mr. Justice Matthews said:

"It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these cases are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare, that the intention of the legislature was that the part pronounced valid should be enforcible even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact. An illustration of this principle is found in *Trade Mark Cases*, 100 U. S., 82 (Bk. 25, L. Ed., 550), where an

act of congress, which, it was claimed, would have been valid as a regulation of commerce with foreign nations and among the states, was held to be void altogether because it embraced all commerce, including that between citizens of the same state, which was not within the jurisdiction of Congress, and its language could not be restrained to that which was subject to the control of Congress."

There was a thorough review and application of the foregoing cases recently, when the secretary of agriculture made a quarantine order in general language not excepting intra-state transportation. Mr. Justice Day (*Ill. Cent. Ry. Co.* v. *McKendree*, 203 U. S., 514, 529; 51 L. Ed., 298, 304) said:

> "The terms of order 107 apply to all cattle transported from the south of this line to parts of the United States north thereof. * * * It is urged by the government that it was not the intention of the secretary to make provision for intra-state commerce, as the recital of the order shows an intention to adopt the state line, when the state by its legislature has passed the necessary laws to enforce the same completely and strictly. But the order in terms applies alike to interstate and intra-state commerce. * * * Nor have we the power to so limit the secretary's order as to make it apply only to interstate commerce, which it is urged is all that is here involved. For aught that appears upon the face of the order, the secretary intended it to apply to all commerce, and whether he would have made such an order, if strictly limited to interstate commerce, we have no means of knowing. The order is in terms single and indivisible."

The subject was again involved in considering the Employer's Liability Act (*Howard* v. *Ill. Cent. R. Co.*, 207 U. S., 463, 500, 52 L. Ed., 297, 310), and Mr. Justice White for a majority of the court, said:

> "So far as the face of the statute is concerned, the argument is this: That because the statute says carriers engaged in commerce between the state, etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business, and none other of such carriers, and that the words 'any employee,' as found in the statute, should

be held to mean any employee when such employee is engaged only in interstate commerce. But this would require us to to write into the statute words of limitation and restriction not found in it. * * * Concluding, as we do, that the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant to the constitution, and non-enforcible."

Within the doctrine of the foregoing authorities, the laws in question are clearly harsh, unreasonable, unfair and discriminatory. This is particularly true of the two cent fare law.

Third. The two cent fare law makes that rate apply only to roads having more than forty-five miles in length. It is clearly discriminatory for this reason (*Cotting* v. *Godard*, 183 U. S., 79, 112, 46 L. Ed., 92, 110; *Gulf C. & S. F. R. R. Co.* v. *Ellis*, 165 U. S., 150-159, 41 L. Ed., 666, *Connelly* v. *Union Sewer Pipe Co.*, 184 U. S., 564, 46 L. Ed., 679, 691, 692). The only basis for the classification is the length of the road. A road of that length, doing a suburban business out of a great city, might earn much more of a return upon the value of its property than one out in the state. The distinction is fanciful and discriminatory. In *Cotting* v. *Godard*, 183 U. S., 79, 103, 109, 112, 46 L. Ed., 92, 106, 107, 109, 110. Mr. Justice Brewer said:

"Clearly the classification is based solely on the amount of business done, and without any reference to the character or value of the services rendered. Kindred legislation would be found in a statute like this: requiring a railroad company hauling ten tons or over of freight a day to charge only a certain sum per ton, leaving to other railroad companies hauling a less amount of freight the right to make any reasonable charge; or, one requiring a railroad company hauling 100 or more passengers a day to charge only a specified amount per mile for each, leaving those hauling 99 or less to make any charge which would be reasonable for the ser-

vice; or if we may indulge in the supposition that the legislature has a right to interfere with the freedom of private contracts, one which would forbid a dealer in shoes and selling more than ten pairs a day from charging more than a certain price per pair, leaving the others selling a less number to charge that which they deemed reasonable; or forbiding farmers selling more than ten bushels of wheat to charge above a specified sum per bushel, leaving to those selling a less amount the privilege of charging and collecting whatever they and the buyers may see fit to agree upon. In short, we come back to the thought that the classification is one not based upon the character or value of the services rendered, but simply on the amount of the business which the party does, and upon the theory that although he makes a charge which everybody else in the same business makes, and which is perfectly reasonable so far as the value of the services rendered to the individuals seeking them is concerned, yet if by the aggregation of business he is enabled to make large profits his charges may be cut down. * * * So we have the clear declaration of the Supreme Court of Kansas that legislation by which one individual, or even one set of individuals, is selected from others doing the same business in the same way, and subjected to regulations not cast upon them, is a discrimination forbidden by the constitutional provision which obtains both in the constitution of Kansas and in that of the United States, to the effect that the equal protection of the laws is guaranteed to all. May we not rightfully accept this declaration of law by the highest tribunal of the state by whose legislature the act in question was passed, and, accepting the reasoning of that decision, does it not follow that, if an act which provides certain regulations for corporations employing ten or more laborers, and leaving corporations employing less than that number free from such regulations, is an unjust discrimination and a denial of the equal protection of the laws, an act which imposes regulations upon corporation doing business over a certain amount, and leaving all corporations doing a like business less than that amount free from such regulations, is equally obnoxious to constitutional prohibition? * * * But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of

two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other. There can be no pretense that a stock yard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra 2 head of cattle per day does not change the character of the business. If once the door is opened to the affirmance of the proposition that a state may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guaranty of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made. This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

VI.

There was the right to continue the litigation previously instituted as against the rates fixed by the acts of 1907.

(1) Question as to Pleadings.

It will be contended that the amendments and supplements filed after the passage of the acts of 1907 were not the proper subjects of supplemental bills, were not germane to or connected with the original bill and that passenger and freight rates should have been the subject of separate bills. In other words, the claim is that by some technical rules of pleading the long trial below was a fruitless task, although no matter in what form pre-

sented the result in the future would not be different. It would be unfortunate if such were the result. When, however, the facts are understood, it will be seen that not only is the state in no position to present the question but the subject-matter was, by its own motion, made and treated as the proper matter of supplement and in any event, the amendment can be treated and sustained as an original bill.

(2) THE STATE IS IN NO POSITION TO RAISE THE QUESTION.

While the original bill was directed against the rates fixed by the act of 1905, yet it (Rec., 11) assailed their validity because:

> "Said rates, considered either separately, as a whole, or in connection with the entire traffic of your orator in said State of Missouri, are unjust, unreasonably low and confiscatory in their nature."

No exception was taken to this averment but it was by answer (Rec., 42) put in issue. This brought into the record an inquiry of all passenger as well as freight rates. The evidence (Rec., 237) at the outset went into the question of all business, freight and passenger. This was necessary in order to divide the expenses common to both, like those arising from station, track and mixed train services and general office expenses. The method of this division clearly appears (Ex. 1, 2, Rec., 4796, 4943). This litigation, in this broad form, was invited by the Governor's message (Rec., 2450-2451) approving the bill, to the effect that after the evidence was taken the legislature or commission could "fix such rates as under the law, *announced by the courts*, are right and just to the railroads and to the people." After volumes of evidence had been taken, the Governor did not wait for the announcement of the courts, but by general and special messages (Rec., 2449, 2450) urged the legislature, *not to repeal* the act of 1905, but to amend it by chang-

ing the live stock rate, adding certain products and modifying the penalty clause. He also transmitted to the legislature (Appendix 9), a letter (*id.*) from the Attorney General to the same effect and which expressly said: "The enactment of a law making these changes in the act of 1905 *would not affect the litigation* now pending * * *." So urged by the Governor and Attorney General, new freight and passenger rate statutes were passed in 1907, all taking effect upon exactly the same day. The freight rates were slightly increased, but this increase was more than overcome by the decrease in the passenger rates, and provision was made that the express repeal of all the act of 1905 relating to rates should not (Sec., 1194b) affect any penalty or liability which had accrued under that act. There was thus carried out the suggestion of the Attorney General to so frame the new law that "it would not affect the litigation now pending." The state thus made it necessary to continue the litigation under the old law. The rates to be charged, however, were necessarily to be determined by the new act. This because the old one had answered its purpose (*Dinsmore* v. *Express Co.*, 183 U. S., 115, 46 L. Ed., 111) and had been displaced by the new. Hence when the state made it necessary to continue the former litigation, the result of which was to be governed by the new law fixing new rates, it was necessary to amend and bring the latter to the attention of the court. These thoughts are emphasized because the legislature attempted to enforce the act solely by criminal penalties, so as to prevent injunction by the federal court. This scheme the then Attorney General thus (Appendix 9) boldly suggested:

> "In addition to the results to be accomplished by further legislation in this direction, *there should be adopted, if practicable, a plan by which a determination of this question can, in the first instance, be kept in the courts of the state of Missouri, and if such a result is possible, it should be accomplished.* While I do not mean to be understood as saying that the federal courts would be unfair to the state,

> yet I do say that if the state of Missouri is a good enough place for the railroads to do business and to make money in, the courts of Missouri are good enough courts in which to litigate the question of the reasonableness of rate regulation adopted by the legislature of the state. And I am satisfied that at least, a more speedy determination of this question can be had in the state than in the federal courts."

This in and of itself gave jurisdiction below to an original bill (*Ex Parte* Young, 209 U. S., 123, 52 L. Ed., 714). The new act having been made with the avowed purpose of defeating new litigation in the federal court, made it necessary to have the facts, in some kind of form, called to the attention of the court. After this, the state consented (Finding 6, Rec., 5308) to a temporary injunction as to freight rates. This consent having been given after the new bill had been filed, it was a clear recognition of the right to file it. The state obtained (*id.*) an order (Rec., 61) keeping in force the two cent fare rate, and had the benefit thereof for two years. Finally, the state, in consideration of a ninety day continuance, consented (Rec., 114) to try all of the eighteen cases upon oral evidence and that theretofore taken under the act of 1905, thus making material in an inquiry under the acts of 1907, the evidence taken under the former act. By consent there were entered these two orders (Rec., 115, 174) clearly recognizing the general jurisdiction and control of the court over the new litigation:

> "This cause came on for hearing this 20th day of June, 1908, upon the written stipulation of the parties of date June 19th, 1908, the court being fully advised in the premises and pursuant to the terms of said stipulation orders that the Chicago, Burlington & Quincy Railroad Company, having since filing of the amended and supplemental bill by mutual consent cancelled its lease with the Chicago, Burlington & Quincy Railway Company, may be and is hereby substituted as complainant herein, without the necessity of filing a new, amended, or supplemental bill, with the same force and effect as if the original amended and supplemental

bills and replications had been filed in its name, the state not waiving, but expressly reserving every objection which could have been made to the jurisdiction had the suit been continued in the name of the railway company, without any termination of the lease."

"Each of the foregoing causes came on for hearing this January 20, 1909, the parties appeared by counsel, and admitted that the term of office of Herbert S. Hadley as Attorney General had expired, and Elliott W. Major was the duly qualified and acting successor and Attorney General of Missouri. He appeared in person, and by the consent of himself and all counsel in the cases, it is ordered that without any formal pleadings, Elliott W. Major as Attorney General of Missouri be and he is hereby substituted for and in the stead of Herbert S. Hadley, so that all pleadings against and on behalf of said Hadley shall apply to the substituted party as fully as if made against and for him."

(3) AMENDATORY AND SUPPLEMENTARY MATTER CAN IN THE INTEREST OF JUSTICE BE TREATED AS AN ORIGINAL BILL.

The order (Rec., 61) permitting the amendment and supplement then recited:

"Complainants' motion for leave to file an amended and supplemental bill is sustained and such leave is given, the same to be filed as of June 11, 1907. Upon such filing process shall issue so that if the court hereafter decides that the ends of justice require, and the rules of equity permit, the said bill may be treated as an amended, supplementary, ancillary, dependent or original bill. To said bill each of the parties named therein shall be and is hereby made a party."

Process was issued (Rec., 73) and presumably served, for appearances were entered (Rec., 74, 75) the same as if service had been obtained. Demurrers were interposed (Rec., 82, 86, 89, 90) and answers (Rec., 95, 103) and replications (Rec., 104, 105) filed, just as would have been done upon original bill, the then attorney general appearing for all of the defendants and making a common defense. The injunction bond (Rec., 20) up-

on which surety had been waived (Rec., 9) which had been filed under the order (Rec., 19) for the injunction against the rates under the act of 1905, was *by consent* (Rec., 61) to "stand as appliable" to the order as to the freight act of 1907, "the same as if it were executed and filed" at that time. In these circumstances it is perfectly proper to treat the new bill as one original in its nature.

Judge McPherson (Rec., 5275, 5276) below said:

"A lesser question is whether the bills tendered for filing are supplemental bills to those filed in this court in the eighteen cases two years ago and now pending before Mr. Schofield, the Master. * * * What is the supplemental bill in equity? And wherein is the importance of defining it? Usually it is where there has been some change in the rights of the parties, which must be carried forward by a supplemental bill. One hundred and more years ago judges who had but little to do except play the role of mental acrobats and seek to refine and distinguish and to display an affected learning, and to discuss most gravely 'the difference betwixt the west and northwest side of a hair' most elaborately set forth their views, as to original bills and amended bills and supplemental bills, and bills of review, and bills in the nature of bills of review. The result was that a chancery case lasted for many years. More than fifty years ago the supreme court recognized the folly of much of this, and by a code of rules adopted the system of fact pleading and left the old chancery practice in force only when the 94 rules adopted did not meet the situation that might arise, and by rule 57 defined a supplemental bill. But that is not important in my judgment. Whether this proceeding should be by original bill, or by supplemental bill is of small consequence. If by original bill, the railways had the right to file the same without notice, and the right to a restraining order without notice. If by supplemental bill the usual practice is to require notice. And in either case it is discretionary with the judge to allow a restraining order without notice until a hearing can be had on notice as to a temporary injunction. On Tuesday the 11th instant, the complainants gave notice of filing these bills on Friday the 14th instant. On Thursday they asked to file them. Solely out of courtesy to the Attorney General, who was not present,

this was refused; but the court on its own motion issued the restraining order, to keep the matter in *statu quo*. At the time fixed for the hearing the matter was again delayed for a day at the request of the Attorney General, he unavoidably being absent. During that delay the bills were filed in the state courts. For thi sthere is no criticism. But I have stated the facts, and the statement of facts shows that these cases, as to the laws of 1907, were pending and had been pending since Tuesday the 11th instant. And these bills must be considered as filed as of that date. And whether defective as original bills is not material, because such defects can be corrected on demurrer or exceptions, or by the complainant before answer as of course. Nor is it material whether filed in the original cases or separately docketed. If separately docketed, they will at once for trial purposes be consolidated with the old cases, pursuant to Section 921 of the Revised Statutes. If the contention of counsel for the state officers be technically correct, it is without substantial merit as to the rights of the parties."

At another time (Rec., 5271, 5272, 5275) he said:

"But I do not deem it of much importance to determine whether the pleadings tendered for filing are supplemental bills, or whether they are original bills. On Tuesday, the 11th inst., the complainants gave notice of filing these bills on Friday the 14th inst. On Thursday, the 13th inst., the railway companies asked leave to file them. Solely out of courtesy to the Attorney General, who was not then present, this was refused, but the court on its own motion issued restraining orders to keep the matter in *statu quo*. At the time fixed, Friday the 14th inst., the matter was again delayed for a day at the request of the Attorney General, he still being absent. And on that day bills were filed in the state courts at Saint Louis and Kansas City, the purpose being as it is said, to bring about the enforcement of this statute in question. And the argument now is, that as these cases were filed in the state courts, on Friday the 14th inst., the day before the arguments were had in this court, that the same subject-matter was pending in the state courts, and that the state courts would take jurisdiction to the exclusion of this court, the cases being there first pending. But the above statement of facts shows that the cases were pending in this court from Tuesday the 11th inst., and that orders were made on Thursday, the 13th inst., the day before the

cases were lodged in the state courts. If these matters could not be covered by supplemental, they could be covered by original bills, and they were presented prior to the institution of the cases in the state courts. It is not material whether these supplemental bills so-called are full and complete as original bills. Defects could be cured upon exceptions or demurrers, or by complainants on their own motion before the filing of an answer. Nor is it material whether these pleadings are filed in the original cases or separately docketed, because if separately docketed, they will at once for trial purposes be consolidated with the old cases pursuant to Section 921 of the Revised Statutes. And whether the contention of counsel for the state officers be technically correct or not, the contention is without substantial merit as to the rights of the parties. These pleadings should be filed and regarded as having been filed on Tuesday, the 11th inst."

A court will freely construe a bill to be original or supplementary as its character warrants. Thus, a bill denominated a bill "in the nature of a bill of revivor and supplement" was treated and disposed of as an original bill, Mr. Justice McLean (*Kennedy* v. *Bank*, 8 How. 586, 609, 610, 12 L. Ed., 1209, 1218) saying:

"This bill has been considered by some of the defendant's counsel as a bill of review. But it has neither the form nor the substance of such a bill. Since the ordinances of Lord Bacon, a bill of review can only be brought for 'error in law appearing in the body of the decree or record,' without further examination of matters of fact; or for some new matter of fact discovered, which was not known and could not possibly have been used at the time of the decree. But if this were a bill of review, it would be barred by the analogy it bears to a writ of error, which must be prosecuted within five years from the rendition of the judgment. (*Whiting et al.* v. *Bank of the United States*, 13 Peters, 15.) Nor is this properly denominated a bill of revivor. When, in the progress of a suit in equity, the proceedings are suspended from the want of proper parties, it is necessary to file a bill of revivor. A supplemental bill is filed on leave, and for matter happening after the filing of the bill, and is designated to supply some defect in the structure of the original bill. But this does not appear to be strictly of that character.

> The complainants denominate it a bill 'in the nature of a bill of revivor and supplement.' It must be treated as an original bill, having for its objects the prayers specifically set forth."

So a bill entitled "supplemental bill" was construed and held to be original (*Great Western Tel. Co.* v. *Purdy*, 162 U. S., 329 335, 40 L. Ed. 986, 990), Mr. Justice Gray saying:

> "The subsequent proceeding, begun September 19, 1874, alleging mismanagement and fraud of the new officers and the insolvency of the company, was by other stockholders, and although entitled a 'supplemental bill,' and permitted by the court to be filed in the former cause, was a distinct proceeding, in which Purdy had and took no interest."

In *Schenck* v. *Peay*, Woolw, 175, 21 Fed. Cas. 667, 669, No. 12450, Mr. Justice Miller said:

> "And in determining whether a bill is original and independent, or is ancillary and auxiliary to a matter already before the court, we are not confined to the line which, in chancery pleadings divides original bills from cross bills and supplemental bills, but may look to the essence of the matter, and to principles which, as regards parties, the federal courts have adopted in reference to their jurisdiction."

In *Ross* v. *Ft. Wayne*, 58 Fed. Rep., 404, 406, a bill was entitled "supplemental and amended bill of complaint," and Judge Baker said:

> "The bill filed by Ross contains all the material averments of an original bill, with the statement of supplemental matter showing the transfer of the rights in question subsequent to the institution of the suit. It is in the fullest sense an original bill in the nature of a supplemental bill; nor is this conclusion varied by the fact that the pleader has denominated it a 'supplemental and amended bill.' Its character must be determined by its frame and by the nature of its averments, and not from the name by which the pleader has designated it."

In *Vigneron* v. *Auto Time Saver Repair Kit Co.*, 171 Fed. Rep., 580, 581, Judge Lowell said:

> "His amended bill before the court contains all the substantial allegations required both of an original bill in the nature of a supplemental bill, and of a supplemental bill proper, although it is entitled as the former exclusively. If the complainant will execute a stipulation (as his counsel offered in open court) to admit under the new bill the proofs taken under the old one, I do not see in what respect the defendant will suffer by the overruling of its demurrer, whatever the amended bill should technically be entitled."

In *MacIntosh* v. *Flint & P. M. R. Co. et al.*, 34 Fed. Rep., 582, at 614, Mr. Justice Jackson, when circuit judge, permitted an original bill to stand as a supplement, saying:

> "The court will now order it to stand, and to be treated as a supplemental bill in the original suit, as may be done under the authorities. Story, Eq. Pl. Secs. 882-905; *Neale* v. *Neale*, 9 Wall. 1; and *Graffam* v. *Burgess*, 117 U. S. 195, 6 Sup. Ct. Rep. 686."

In *Neale* v. *Neale*, 9 Wall, 1, 19 L. Ed., 590, 591, 592, Mr. Justice Davis said:

> "It is insisted that this proceeding was erroneous; that after a cause has been heard the power of allowing amendments ceases, or if it exists at all, it cannot go so far as to authorize a plaintiff to change the framework of his bill, and make an entirely new case, although on the same subject-matter, as, it is contended, was done in this instance under the leave to amend. This doctrine would deny to a court of equity the power to grant amendments after the cause was heard and before decree was passed, no matter how manifest it was that the purposes of substantial justice required it, and would, if sanctioned, frequently embarrass the court in its efforts to adjust the proper mode and measure of relief. To accomplish the object for which a court of equity was created, it has the power to adapt its proceedings to the exigency of each particular case, but this power would very often be ineffectual for the purpose, unless it also possessed the additional power, after a cause was heard and a case for relief made out, but not the case disclosed by the bill, to al-

low an alteration of the pleadings on terms, that the party not in fault would have no reasonable ground to object to. That the court has this power and can, upon hearing the cause, if unable to do complete justice by reason of defective pleadings, permit amendments, both of bills and answers, is sustained by the authorities, Mitf. Ch. Pl., pp. 326, 331; Story Eq. Pl., secs. 904 and 905; Dan. Ch. Pr. & Pl., pp. 463, 466; *Smith* v. *Babcock*, 3 Sumn., 583; *McArtee* v. *Engart*, 13 Ill. 242.

Necessarily, in a federal tribunal the matter of amendment at this stage of the progress of a cause rests in the sound discretion of the court. At an earlier stage, this discretion is controlled by the rules of equity practice adopted by this court, but not so upon the hearing, for there is no rule on the subject of amendments applicable to a cause which has advanced to this point. As, therefore, the leave to amend in this instance was within the discretion of the court, we will proceed to dispose of the case on its merits. It is unnecessary, in the view we have taken of the power of the court over amendments at the hearing, to discuss the question whether the amended bill is materially different from the original bill. It is enough to know, if different, that the subject-matter of both bills is the same, and that the contract, consideration, promise, and acts of part performance, stated in the amended bill, are stated with sufficient precision and, if supported by proof, entitle the complainants to the relief which they seek at the hands of a court of equity."

It is hardly conceivable that in view of the action of the state officers, the conduct of the case and consent orders made, the bill would not be treated as an original one, even if technically it were not proper as one of supplement, though it can be sustained as the latter.

(4) THE BILL WAS, HOWEVER, PROPERLY SUPPLEMENTARY.

Upon this subject, Judge McPherson (Rec., 5271, 155 Fed. Rep., 220, 221, 222) said:

"A question connected with that is whether the bills tendered are supplemental bills to those filed in the 18 cases two years ago to enjoin the enforcement of the freight tariff

law of 1905 now pending before the master. A supplemental bill usually is where there has been some change in the rights or status of the parties which must be carried forward by a supplemental bill, and usually, when a supplemental bill is thus allowed, matters can be brought in which could have been covered by an amendment to the original bill. These discussions as to supplemental bills, as well as to other bills, are exceedingly technical. It seems to me that the test is, not so much in the way a pleading is styled, as what the allegations of the pleadings are. Formerly, discussions as to various bills in equity gave rise to great delay; the results being that years and years would elapse before a chancery case could be concluded. Looking back at those old discussions, it now seems to have been a folly to thus waste the time and energies of the judges and of counsel in determining such technical questions. Such must have been the belief of the supreme court when a code of rules in equity was established; the purpose no doubt being to get rid of the old technicalities which served no useful purpose. By the adoption of the rules in equity, we have a system of fact pleading, covering almost every phase of equity pleading and practice; and it is only when some question of practice is not covered by the rules that we go back to see what the practice of the High Court of Chancery in England was, and then not as positive rules, but as furnishing just analogies. Rule 90 thus providing was adopted in the year 1842, and the supreme court has decided that, when we go to the English Chancery practice, we must take the practice as it existed in England in 1842 when this rule was adopted. By rule 57 it will be seen that the supplemental bill is allowed when any material event has happened after the filing of the original bill. In 1905, the Legislature of Missouri enacted a maximum freight tariff statute as to several commodities. The railways contested the validity of that statute in the 18 actions above referred to, and these actions are still pending. By the act of 1907 the Legislature declared that all railways should charge but two cents per mile per passenger. It seems to me that this is an event happening since the institution of the original suits, and an event that is germane to the original controverted questions."

In Story on Equity Pleading (10th Ed.), Sec. 336, it is said:

"In the next place, when new events or new matters have occurred since the filing of the bill, a supplemental bill

is, in many cases, the proper mode of bringing them before the court; for, generally, such facts cannot be introduced by way of amendment to the bill. (a) But, here, we are to understand, that such new events, or new matters, do not change the rights or interests of the parties before the court (for then, properly speaking, the bill is not simply a supplemental bill), but they merely refer to and support the rights and interests already in the bill. A supplemental bill may also be brought, not only to insist upon the relief already prayed for in the original bill; but upon other relief different from that which was prayed for by the original bill, where facts which have since occurred may require it."

So at section 345:

"Secondly, an original bill in the nature of a supplemental bill. This division is founded rather upon formal technical principles, than upon any substantial difference from a supplemental bill, properly so called. Indeed, in the books they are usually confounded together. The most prominent distinction between them, however, seems to be, that a supplemental bill is properly applicable to those cases only, where the same parties, or the same interests, remain before the court; whereas, an original bill in the nature of a supplemental bill, is properly applicable, when new parties, with new interests, arising from events since the institution of the suit, are brought before the court."

Again at Section 346:

"Thus, for example, when any event happens, subsequent to the time of filing an original bill, which gives a new interest in the matter in dispute to any person not a party to the bill, such as the birth of a tenant in tail; or which gives a new interest to a party upon the happening of some other contingency; the defect may be supplied by a bill, which is usually called a supplemental bill, and is in fact merely so with respect to the rest of the suit, although with respect to its immediate object, and against any new party, it has in some degree the effect of an original bill. If any event happens, which occasions any alteration in the interest of any of the parties to a suit, and does not deprive a plaintiff suing in his own right, of his whole interest in the subject, as in the case of a mortgage or other partial change of interest; or if a plaintiff, suing in his own right, is entirely deprived of his

interest, but he is not the sole plaintiff; the defect arising from either event may be supplied by a bill of the same kind, which is likewise commonly termed, and is in some respects, a supplemental bill merely, although in other respects, and especially against any new party, it has also in some degree the effect of an original bill. In all these cases, the parties to the suit are able to proceed in it to a certain extent, although from the defect arising from the event, subsequent to the filing of the original bill, the proceedings are not sufficient to attain their full object. The bill here spoken of is properly called an original bill, in the nature of a supplemental bill; because it is original, as to the new parties and new interest; and it is in some sort supplemental also, as being an appendage to the former bill as to the old parties and the old interests."

A mere recital of the facts brings the case within these principles.

(5) THE BILL WAS NOT MULTIFARIOUS.

This question was disposed of below (Rec., 5278; 155 Fed. Rep., 220) adversely to the state officers.

It is impossible to consider any fixed expense or charge of a railroad without charging a portion thereof to passenger and a portion to freight service. This is particularly true of the roadbed, bridges, terminals and the like. Hence, there is a common bond of union which destroys the contention. Upon this question the decision in the Minnesota case (*Perkins* v. *Nor. Pac. R. Co.*, 155 Fed. Rep., 445, 447, 448,) is precisely in point. The character of the bills was thus stated by Judge Lochren:

"These suits have been brought by one or more stockholders of each of nine railroad companies doing business within the state of Minnesota, and each of them also engaged in interstate business, claiming that the rates fixed by the Railroad and Warehouse Commission, and which have been termed by counsel the "Merchandise Rates," as well as the rates fixed by the legislature of the state by the act of April 4th, of the present year (called the "Passenger Rate Law"), and the rates also fixed by the legislature by the act of April 18th, of the present year (chapter 232 of the statutes of this year,

Laws 1907, p. 313), are so low as to not afford adequate compensation to the railroad companies for the services that they are required to perform and a reasonable return upon the property which is invested by these railroad companies, and used in the business, and therefore are confiscatory under the provisions of the Constitution of the United States that no state shall deprive any person of life, liberty or property without due process of law, or deny equality under the laws; that the requiring of the railroad companies to do business at these rates would not afford adequate compensation, and are equivalent to taking their property without due process of law. These bills of complaint are met by demurrers upon various grounds."

Upon the subject he said:

"Another ground is that the bills are multifarious, in joining the Warehouse and Railroad Commission and the attorney general, because the acts complained of are separate and distinct acts and the acts of different bodies. The order of the Railroad and Warehouse Commission, of September 6th, of last year, was promulgated by that commission under the authority of a legislative act, and, as has been decided in many cases, such an order has the same effect as a legislative act; that is, that the legislature has a right to empower administrative bodies to act in respect to this matter of rates and other matters of regulation concerning public corporations engaged in the business of transportation, so that its order has the same effect as a legislative act. And the other two acts complained of are acts passed by the legislature. They all amount to legislation that has been put forth by the state, and it seems to me that complaints against all these acts may properly be joined in one action, and that the Railroad and Warehouse Commission have such charge in respect to the enforcement of these rates that they can properly be made defendants in an action of this kind, as well as the attorney general."

Sir John Leach, in *Salvidge* v. *Hyde*, 5 Mad., 138, quoted in Daniels Ch. & Pr., 336, said:

"In order to determine whether a suit is multifarious, or in other words contains distinct matters, the inquiry is not whether each defendant is connected with every branch of the cause, but whether the plaintiff's bill seeks relief in respect of

> matters which are in their nature separate and distinct. If the object of the suit be single, but it happens that different persons have separate interests in distinct questions which arise out of that single object, it necessarily follows that such different persons must be brought before the court in order. that the suit may conclude the whole subject."

In *Hayden* v. *Thompson*, 71 Fed. Rep., 60, 67, Judge Sanborn said:

> "While it may be difficult or perhaps impossible to draw the definite line of demarcation between bills that are and are not multifarious, it may be safely asserted that no bill is multifarious, which presents a common point of litigation, the decision of which will affect the whole subject-matter and will settle the rights of all the parties to the suit."

In *Brown* v. *Safe Deposit Co.*, 128 U. S., 403, 412; 32 L. Ed., 468, 470, the court said:

> "It is not indispensable that all the parties should have an interest in all the matters contained in the suit. It will be sufficient if each party has an interest in some material matter in the suit that they are connected with the others."

Grant v. *Phoenix L. Ins. Co.*, 121 U. S., 105, 30 L. Ed., 905, 908, involved a bill seeking to foreclose an equity under twenty-six trust deeds executed to five different sets of trustees. One deed only covered all the property. The complainant was beneficiary under all the deeds. All the trustees and certain purchasers of lots and certain holders of liens against various lots were made defendants. The court said:

> "Nor is the bill open to the objection that it is multifarious. The fact that one of the deeds of trust covers the entire property, and that some of the creditors of Grant who were made defendants have liens upon various portions of that property makes it eminently proper and indeed indispensable, if a clear title is to be given by a sale, to adjudicate all the claims in one suit."

In *Nelson* v. *Hill*, 5 How., 127, 12 L. Ed., 81, suit was brought by two sets of creditors against representatives of deceased partners of two firms and the surviving partner of one of the firms. One of the decedents had been a member of both firms. Held: The bill was not exceptionable for multifariousness.

U. S. v. *Flournoy Live Stock Co., et al.*, 69 Fed., 886. was a suit by the United States as trustee for Indians to whom lands had been allotted in severalty seeking to oust persons occupying under void leases. The defendants claimed under separate leases from different lessors. The court held: That although the defendants have no common interest in the suit, since the United States have one of common interest touching the matter of the bill, arising out of the trust relation existing between them and the Indians, the bill was not multifarious.

Way v. *Bragaw*, 16 N. J., Eq., 213. The bill charged that B., a judgment debtor, had fraudulently conveyed real estate to H., and personal property to W. The prayer was that the conveyance to H. and the transfer to W. be declared void, and that the property of B. be applied in payment of complainant's judgment. The court said:

> "Where there is one entire case stated as against the debtor it is no objection that one or more of the defendants, to whom parts of the property have been fraudulently conveyed, had nothing to do with other fraudulent transactions. The case against the debtor is so entire that it cannot be prosecuted in several suits and yet each of the defendants is a necessary party to some part of the case stated. In such case neither of the defendants can demur for multifariousness or for misjoinder of causes of action in some of which he has no interest."

In Story Equity Pleadings, 10 Ed., 285-286, this is treated as a well-recognized exception to the general doctrine respecting multifariousness. The rule was thus stated by Chancellor Walworth, in *Boyd* v. *Hoyt*, 5 Paige, 78:

"Where the object of a suit is single, but different persons have or claim separate interests in distinct or independent questions, all connected with and arising out of the single object of the suit, the complainant may bring such different persons before the court as defendants; so that the whole object of the bill may be obtained in one suit, and to prevent further unnecessary and useless litigation."

In Foster Fed., Pr. 75, it is said:

"Multifariousness depends so much upon the discretion of the courts of first instance that a decision overruling an objection upon that ground would not be reviewed upon appeal except under very extraordinary circumstances. When an objection for multifariousness is sustained the complainant will always be allowed, if he asks leave to do so, to amend upon payment of costs. In general, it may be remarked that multifariousness is an objection much more often taken than sustained."

See also *Virginia* v. *West Virginia*, 206 U. S., 290, 51 L. Ed., 1068.

There was in the suit a single object. The bill alleged that the observance of certain acts of the legislature would result in reducing largely the revenue of the company from its business. These acts are of the same nature, part relating to freight rates, part to passenger fares. The same question of law and of fact arise, i. e., whether the rates prescribed are confiscatory. As against the company it would be wholly improper to file separate bills upon each act. In case of a beneficiary complaining of fraudulent dissipation of trust funds by a trustee, as well might it be said that a separate suit would be necessary upon each fraudulent act.

As declared by the cases cited, an objection will not lie to a bill on the ground of multifariousness merely because some of the defendants are not interested in all the matters in the bill. The railway company is interested in them all an the defendants are each interested in all. Had separate bills been filed upon each act

involved, the court would have granted a motion (Sec. 921, Rev. Stat.,) to consolidate the suits, for the reason that they would have been "of a like nature or relative to the same question." To have refused would have involved the court in the necessity of taking substantially the same testimony in different suits, each having the same parties complainant and defendant.

VII.

Right to enjoin state officers if the rates were confiscatory.

(a) The Attorney General induced the legislature to follow his suggestion of defeating jurisdiction below by passing an act limiting the enforcement of the rates fixed to criminal process. But there is no longer any question that injunction will lie (*Smyth* v. *Ames*, 169 U. S., 466, 42 L. Ed. 819; *Ex. Parte* Young, 209 U. S., 123, 52 L. Ed., 714; *Hunter* v. *Wood*, 209 U. S., 205, 52 L. Ed., 747; *Prentiss* v. *Atlantic Coast Line*, 211 U. S., 210, 53 L. Ed. 150; *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19; 53 L. Ed. 382). This conclusion was reached below in elaborate opinions (Rec., 5279-5285, 5286-5304, 161 Fed. Rep. 419, 168 Fed. Rep. 317). It has been the subject-matter of a recent elaborate discussion by Judge Hook (*A. T. & S. R. Co.*, v. *Love*, 174 Fed. 59; *M. K. & T. R. Co.* v. *Love*, 177 Fed. Rep., 493), where the cases were reviewed and the present state of the law accurately summarized.

(b) When the litigation began the state officers suggested that the bill assailing the rates under the act of 1905 was premature. Judge Philips (Appendix 8) thus fully answered the contention:

> "The first objection that is made to the bills is that the actions are premature. That until the railroad commission-

ers take some affirmative action in the way of establishing a schedule of rates under the provisions of the general statutes applying not only to the classified objects or subjects mentioned in the Act of the Legislature, but also as to other schedules not included in the carload rate fixed by the act. That it is impossible to determine even apparently in the first instance, whether the maximum rates fixed on these articles is excessive or not, and that until that is done, there is no probability or small possibility of any affirmative action being taken by those in authority or in position to claim against the offending carriers. With respect to that it seems to be sufficient to say that by the provisions of the existing statute, particularly Section 1136 of the General Statutes of Missouri, it makes it the duty of the carrier at once, and makes the carrier amenable to the rate of 1905, because he is a party to the proposed schedule, which will not exceed the maximum rate fixed by law or which may hereafter be fixed. The Railroad Commissioners have no function to perform, or rather no power, so far as they are concerned, to fix a rate that is in excess of the maximum rate, because that is fixed by law—by statute—and the carrier at once becomes amenable to the penalty prescribed for violating this statute, and at once becomes amenable to action by the railroad commissioners, or by the state officers to proceed against them in the event they should exact for carriage of any of the prescribed articles a greater rate than that fixed as the maximum. So that, without any action at all, the moment that the carrier should demand or receive from the shipper a higher rate than the maximum prescribed in this statute, it becomes amenable to the law, and it certainly is the right of the carrier to have the question determined as a matter of law as to whether he is amenable to that statute or not. It seems to me that he ought to be permitted to take that action to test the validity of that rate established by law as much so as if it had been established by affirmative order of the railroad commissioners, the right to complain of it because it interferes daily and hourly with the shipments that he may propose to make over and above that maximum rate, that is, independent of any action that the railroad commissioners may take in the matter of establishing a schedule of rates for the railroad companies."

Section 1136, (Rev. Sts. Mo. 1899) thus referred to by Judge Philips, is attached hereto as Appendix 7a. When it is read in the light of the opinion, it renders the latter unanswerable.

The same observations would apply to the freight acts of 1907. However, the injunction was as to the rates fixed by the latter, granted by consent, so no such question can arise.

VIII.

As to the claim that the railroad commissioners have duties to perform as to the passenger rates and were improperly enjoined from enforcing same.

(a) One question suggested in the twelfth assignment of errors (Rec., 5260-5261) is that there should have been no finding against the railroad commissioners as to the passenger rates. No harm could come to them from such injunction, nor would there have been any practical difficulty in relieving them from that injunctive relief, just as was done below as to passengers, thus leaving them bound only by the decision, the decree only to be enforced against them, if they hereafter assert the right to enforce the rate. If they will accept this amendment of the decree, without costs, it will be acceded to rather than to take the time of counsel to discuss, or of the court to consider the question. If they will not so consent, the injunction ought to stand for the reasons to be here given..

(b) No question of this kind was ever suggested below till presented after the term by the twelfth assignment of error. The court asked (Findings 17, 20, Rec., 5315, 5327) in vain for suggestions from counsel as to any error or inaccuracy upon its part. The same answers were filed to the bills (Rec., 95, 103, 104) for all the defendants who all claimed that all the rates were confiscatory. No point was made that the railroad commissioners had duties to perform as to one act but not as to another. The new bill (Rec., 71) averred:

> "Each of the special duties devolving upon the members of the Board of Railroad Commissioners and the Attorney General, as stated in the original bill, applies to the acts of 1907 and passenger act aforesaid, so that even as an original bill, this proceeding could be maintained."

The answer of the Attorney General (Rec., 97) as to this averment was:

> "This defendant says that it is not true that the special duties devolving upon the members of the Board of Railroad Commissioners and the Attorney General, *as stated in the original bill,* apply to the acts of 1907, and the passenger act aforesaid."

This was a mere negative pregnant which is equivalent to a legal admission. In 1 Encyclopaedia of Pleading and Practice 796, it is said:

> "A negative pregnant is that form of a denial which implies an affirmative. * * * The general rule is that if the denial is a negative pregnant it amounts to no denial at all, and the allegations of the complaint are treated as admitted. * * *"
>
> "If several material facts are stated conjunctiaely in a complaint, an answer which undertakes to deny these averments as a whole, as conjunctively stated, is evasive, and is an admission of the averments thus attempted to be denied."

The answer denied only that *all* the duties, as stated, apply to all parties and all acts. This is pregnant with admissions. The commissioners simply adopted (Rec., 103, 104) the answer of the Attorney General. Fair play demanded that if they were asking for any limitation of duties to be by them performed they should have made an averment on the subject.

(c) The assignment of errors (Rec., 5257, 5264) are joint and not several and the Attorney General is not interested in this question. "A joint assignment of errors with specifications against a single defendant presents no question." (*Lake* v. *Lake*, 99 Ind.

339); "If it cannot be sustained as to all, it must be overruled as to all" (*Gordon* v. *Little*, 41 Neb. 250, 59 N. W. 783). In Elliott on Appellate Procedure, 318, it is said:

> "Where several parties unite in one assignment of error, they will encounter defeat unless the assignment is good as to all. If the errors affect the parties severally, and not jointly, the proper practice is for each party to assign errors, for the rule is well settled that a joint assignment will not permit one of several parties to avail himself of errors alleged upon rulings which affect him alone, and not those with whom he unites in the assignment."

(d) It is, however, not necessary to reply upon the foregoing suggestions because the statutes of the state, when considered as a whole, necessarily imply that the commissioners have specific duties to perform. An act of 1907 (Laws Mo., 1907, 386-387), gives almost plenary powers to the commission, sections 1 and 4 thereof providing:

> "Section 1. All orders of the board of railroad and warehouse commissioners, when made in accordance with the powers conferred upon them by the laws of this state, shall be in force and effect until overruled or modified on a final hearing by a court of competent jurisdiction. Such orders, shall likewise be in effect pending an appeal of any case from the lower courts to the higher courts, unless a supersedeas bond be given, as hereinafter provided.
>
> Section. 4. Any corporation, co-partnership or individual, or association of individuals refusing to comply with the orders of said commissioners, made in accordance with the provisions of law, shall be subject to a penalty of not exceeding five hundred dollars for each day that he or it so fails or refuses to comply with such orders. Such penalties may be recovered in a civil proceeding to be instituted in any court of competent jurisdiction in the name of the state of Missouri, at the relation and to the use of said commissioners. Said proceedings to be instituted by the attorney general or prosecuting attorney of the county in which the violation takes place, at the request of said commissioners, or may be instituted by special counsel to be selected by the commissioners, and such special counsel shall receive as his com-

pensation for such service such per cent of the amount collected as shall be fixed by the court trying the same, not to exceed twenty-five per cent thereof."

The passenger act of 1907 (Appendix 7, Laws Mo. 1907, pp. 170-171) is by its terms made part of Article 4, Chapter 12, of the Revised Statutes of Missouri, 1899, and provides, "that the rates for transportation herein prescribed may be reduced *as hereinafter provided.*" The provision in this respect is similar to that of the old law (Rev. Stat. Mo. 1899, Sec. 1192) and evidently referred to Section 1194a (Laws 1903, p. 132, Appendix 1) the part of the same article which defined the steps to be taken by the commissioners to reduce not only freight rates but any charges.

With these preliminary suggestions we proceed to consider the constitutional and statutory provisions of Missouri as to railroad commissioners. Extended and tiresome as this review must necessarily be, we cannot, in justice to the case, let the matter pass unnoticed, so long as the point is made.

(e) Sections 12 and 14 of article XII of the state constitution evidently contemplate a uniform system of laws dealing with passengers and freights, thus demonstrating the correctness of the view below expressed upon the application for a temporary injunction (Rec., 5278; *St. L. & S. F. R. Co.* v. *Hadley*, 155 Fed. Rep., 220, 224) in these words:

> "I do not stop to review the various Missouri statutes upon the subject of both passengers and freight, all of which must be considered in *pari materia.*"

Section 12 provides:

> "It shall not be lawful in this state for any railway company to charge for freight or passengers a greater amount, for the transportation of the same, for a less distance than the amount charged for any greater distance; and suitable laws shall be passed by the General Assembly to enforce this provision; but excursion and commutation tickets may be issued at special rates."

Section 14 provides:

> "Railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and railroad companies common carriers. The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads, and enforce all such laws by adequate penalties."

The statutory provisions carry out this view. Section 1198 (Rev. Sts. Mo. 1899) was first adopted in 1875 (Laws 1875, p. 115, sec. 7) and without change carried into the Revised Statutes of 1879 (Sec. 837) and 1889 (Sec. 2678). It provides for the office of railroad commissioners. Section 1199 first adopted in 1893 (Laws 1893, p. 83) provides that if *any* interstate rates are deemed to be unjust, excessive or unreasonable, the commission shall make complaint to the interstate commerce commission, which complaint shall then be prosecuted by the attorney general. While the section makes the affirmative duties of investigation as to rates of carriers engaged in the transportation of freight, still the right to make complaint to the interstate commerce commission is not limited to freight and exclusive of passenger rates, but to *all* "rates charged by any such common carrier on interstate business."

Sections 1200, 1201 and 1202 (Rev. Sts. 1899) were first adopted in 1875 (Laws 1875, p. 115, Secs. 8, 9, 10) and were without change incorporated into the Revised Statutes of 1879 (Secs. 838, 839, 840) and 1889 (Secs. 2679, 2680, 2681). These sections give the fullest power to the commissioners to subpoena witnesses, examine books and papers, and conduct *any* investigation. No greater inquisitorial powers could be given. These are to be exercised either "in making any examination as contemplated in this article" (Sec. 1201), or "upon complaint being made and

filed against any railroad company." As these provisions appeared in the original act (Laws 1875, pp. 113-119, now sections 1191-1197) forbidding charging more than both maximum freight and passenger rates, it is perfectly manifest that the board has the right to conduct a *general* inquiry, either upon its own motion, or upon complaint, as to whether any company is violating either the *passenger* or freight maximum rate law.

In 23 A. & E. Enc. L. (2nd Ed.) 653, 654, the general view entertained by courts as to the powers of such bodies is thus expressed:

> "In the United States, as a general rule, a state railroad commission is merely an administrative board created by the state for carrying into effect the will of the state, as expressed by its legislation. * * * As it is essential to the usefulness of these commissions that they should be able to ascertain the manner in which the railroads under their supervision are being conducted, they are usually given ample power to investigate that subject, and to compel railroad companies to furnish them with necessary information. * * * Generally such commissions are required to investigate complaints made against railroad corporations which are alleged to have violated the law, or to be acting in contravention thereof, and they are authorized to make orders or render decisions in reference thereto."

Section 1203, first adopted in 1883 (Laws 1883, p. 52; Rev. Sts. 1889, sec. 2683) provides for printing the reports of the commission. Section 1207 (Laws 1875, p. 118, sec. 15; Rev. Sts. 1879, sec. 845; Rev. Sts. 1889, sec. 2687) provides for the oath and bond of the commissioners, while section 1208 Laws 1875) p. 119, sec. 16; Rev. Sts. 1879, sec. 846; Laws 1881, p. 82; Rev. Sts. 1889, sec. 2688) provides for the salaries and contingent expenses of the commissioners, for the appointment of a secretary, and that "a copy of any of their proceedings, or of any documents on file in their office, duly certified, shall be taken as evidence in the courts of this state." These sections

clearly show the establishment and existence of the commission to be a permanent part of the state government to deal with the entire railway transportation problem.

Sections 1204 and 1206 were first adopted in 1875 (Laws 1875, pp 117, 118, secs. 12, 14) and without change incorporated in the Revised Statutes of 1879 (Secs. 842, 844) and 1889 (secs. 2684, 2686). Section 1204 gave the commissioners the right to classify all articles of freight except classes D, E, G and H, mentioned in section 1193, and to reduce the maximum freight rates fixed under sections 1194 and 1195. Section 1206 made a misdemeanor of each departure from the rate thus fixed, giving to shippers a cause of action for treble damages in each of such instances and for departure from "the rates prescribed by this *article*" i. e. article 4, which includes the maximum rates for possengers (sec. 1192; Laws 1875, p. 113, sec. 2; Rev. Sts. 1879, sec. 832; Rev. Sts. 1889, sec. 2673) and freight (Sec. 1194; Laws 1875, p. 113, sec. 4; Rev. Sts. 1879, sec. 834; Rev. Sts. 1889, sec. 2675.)

Section 1206 also contains the following:

> "But nothing herein contained shall be so construed as in any manner to abridge or control, or to in any way authorize the commissioners to abridge or control or regulate the rates for freight or passengers charged by any railroad company in this state for carrying any freight or passengers which come from beyond the limits of this state, and to be carried through or across this state, but the said railroad and transportation companies shall possess the same power and right to charge such rates for carrying such through freight and passengers as they possessed before the passage of this article."

This language first enacted in a law creating the commission and allowing it to fix rates, and thereafter continued in force by implication at least, puts the state passenger rates to a greater or less extent under the domain of the commission.

Section 1205 was first adopted in 1875 (Laws 1875, p. 117, sec. 13) and without change continued in force in the Revised Statutes of 1879 (sec. 843) and 1889 (sec. 2685). This section gives to the commission full power to investigate the condition, compel the repair of, and stop the "running of passenger trains over" *any* "track, bridges or other structure or works * * * unfit for the transportation of passengers with reasonable safety." If, in disregard of the instructions of the commissioners, an accident occurs resulting in death or injury to "passengers," the superintendent, engineer and conductor are guilty of a felony. The commissioners *must* publish notice of the failure of the company to obey their order, and *they* are entitled to recover a penalty of $1000 per day. As this section relates alone to the transportation of *passengers,* it is a clear instance of specific duties as to their being imposed upon the commissioners.

Section 1210, as amended (Laws 1905, p. 101) requires railroad companies to run "their *passenger* trains so as to connect with each other," and expressly provides that the commissioners shall "require such companies to so run and operate their passenger trains as to make reasonable daily connections with each other in the arrival and departure of their trains so as to cause as little delay as practicable for passengers." The commissioners in cases of difference (sec. 1211) "determine how such connection shall be made," and "settle and determine all differences between said companies in relation thereto," and upon complaint (sec. 1212) of three residents, must make such an inquiry, making (sec. 1213) of record their order, a violation of which is (sec. 1214) made a misdemeanor. Thus again the commissioners deal with matters affecting only passenger transportation.

In 1905 an act (Laws 1905, pp. 104-105, secs. 1219a-1219b) was passed authorizing the commissioners to fix the times when and places where *passenger* trains should be stopped, and a violation of the order was made a misdemeanor. So an act (Laws

1905, pp. 108, 109) was passed authorizing the commissioners "to require the companies operating" certain "branch railroads to run and operate their *passenger* and mixed trains, so as to make reasonable daily connection with the passenger trains on the main or trunk lines of said railroad company or companies, and to fix the time of the arrival and departure of their trains on said branch railroad." These sections again illustrate that *passenger* transportation is dealt with by the commission.

Section 1191, first adopted in 1875 (Laws 1875, p. 113, sec. 1) and without change continued in Revised Statutes of 1879 (sec. 831) and 1889 (sec. 2672) divided all railroads into three classes, A. B and C. Section 1192, adopted in 1875 (Laws 1875, p. 113, sec. 2) continued without change in the Revised Statutes of 1879 (sec. 832) and 1889 (sec. 2673) fixed a maximum passenger rate (known as the "three-cent-law") with the proviso "that the rates of transportation herein prescribed may be reduced as *hereinafter* provided." It is difficult to point out the provision meant by the words "hereinafter provided," unless it is section 1204 which provides that the "said railroad commissioners * * * are * * * empowered and authorized to reduce *said* rates on any of said railroads or parts either in general or special classes whenever in their judgment it can be equitably done." The word "said" refers to nothing in the section, hence it must have reference to the *act* (Laws 1905, pp. 113-119) and the rates thus authorized to be reduced are the passenger (sec. 1192, Laws 1875, p. 113, sec. 2) as well as the freight (sec. 1194, Laws 1875, p. 113, sec. 4) mentioned in the original act Laws 1875, pp. 113-119) and in article 4 (Rev. Sts., Mo. 1899, pp. 394-401). If this view be correct, there is express authority to *reduce* both passenger and freight rates. Sections 1191 and 1192 were repealed in 1907 (Laws 1907, pp. 170, 171) and "three new sections * * * enacted in *lieu thereof*." This is the passenger act set forth in the supplemental bill. Passenger roads

were thereby thrown into four classes (A, B, C and D) instead of three classes (A, B and C), and for the first three classes the fare was fixed at two cents with the proviso "that the rates for transportation herein prescribed *may be reduced as hereinafter provided.*" As these sections were enacted in *lieu* of sections 1191 and 1192 in article 4 (Rev. Sts. 1899) they became part of that article, and the quoted words refer to the power of the commissioners to reduce as provided in section 1204. Otherwise the quoted words are meaningless. Section 1192a made each violation of the act a misdemeanor and solely by reason thereof the state claims that the sole redress is by criminal action and the commissioners have nothing to do with passenger transportation or rates.

Section 1193 first adopted in 1875 (Laws 1875, p. 113, sec. 3), and continued without change in the Revised Statutes of 1879 (sec. 833) and 1889 (sec. 2674), made a general classification of freights with the proviso:

> "All articles not before enumerated or subsequently set into classes as hereinafter provided, shall be placed in and belong to the four general classes to be classified by the railroad commissioners hereinafter to be provided."

Section 1194, first adopted in 1875 (Laws 1875, p. 113, Sec. 4), and continued without change in the Revised Statutes of 1879 (Sec. 834) and 1889 (Sec. 2675), fixed maximum rates for the freight classified by section 1193. The section contained this clause:

> "In computing the rate of freight according to the provisions of this article, the distance shall be computed from the point where it is received to the point of destination in the state, notwithstanding it may pass from one road to another."

This clause in and of itself destroys the justice of the law. For instance, it fixes live stock rate at $10 per car for the first 25 miles, $7 for the next 25 miles, and $4 for each succeeding 25

miles, or $25 for 100 miles. If the three roads carry, the first and last but five miles each, they together would receive but 1/10th of the whole freight, or $2.50, yet each would do the terminal work of loading and unloading, which would cost more than it received. Section 1195, first passed in 1891 (Laws 1891, p. 80) fixed a maximum car load rate for melons. In 1905 (Laws 1905, p. 102) section 1194 (Rev. Sts. Mo. 1889) was repealed and in lieu thereof a maximum freight law adopted as to the freight classified by section 1193, the legislature adopting three new sections to be known as sections 1194, 1194a and 1194b, to be "collocated between the existing sections 1193 and 1195." An act of 1903 (Laws 1903, p. 132) had adopted two new sections as 1194a and 1194b. This made two sections thus doubly designated. This act of 1905 is the act the enforcement of which was sought to be enjoined by the original bills herein. Section 1194 thus adopted raised the rates very considerably, providing that "no individual or corporation operating many or leasing any railroad or part of railroad" should exceed the same. Section 1194a provides that "any railroad company so offending" shall forfeit the freight and pay treble damages. Section 1194b repealed all acts of the railroad commission in conflict therewith. In 1905 (Laws 1905, p. 104) a maximum rate was fixed for stone and brick. In 1907 (Laws of 1907, pp. 171-173) the two freight acts of 1905 (Laws 1905, pp. 102, 104) were repealed and there were "enacted in lieu thereof" four new sections as a new maximum for the freight (Sec. 1194) classified by section 1193 (Rev. Sts. 1899) and stone and brick, thereby reducing the rates of some freight. The penalty was changed (Sec. 1194a) so as to make a violation by company or individual a misdemeanor punishable by a fine not to exceed $5000 to "be paid into the school fund," but all penalties incurred under former laws were (Sec. 1194b) kept in force. This is one of the acts which is the subject of the amended and supplemental bills. In 1907 (Laws

of 1907, p. 187) a new section was adopted to be known as section 1195a, fixing maximum carload rates upon apples, pears peaches, grapes and berries. Another act (Laws 1907, p. 176) was passed requiring transportation to be given to live stock shippers. Both of these acts are the subject of complaint in the amended and supplemental bills. As already seen, the rates fixed by these maximum rate laws are subject to further reduction (Rev. Sts. 1899, Sec. 1204) by the commissioners, and do not cover the rates to be charged for the classified subjects in lots less than those specified.

Sections 1196 and 1197, first adopted in 1875 (Laws 1875, pp. 114, 115, Sec. 5, 6) and continued without change in the Revised Statutes of 1879 (Secs. 835, 836) and 1889 (Sec. 2676, 2677) provide that whoever shall "charge or receive any greater rate of compensation for carrying freight or *passengers*" shall forfeit the compensation, be guilty of a misdemeanor, and liable for treble damages, and that prosecutions may be had before justices of the peace as well as in the circuit courts.

In 1903 (Laws 1903, p. 132), an act was adopted adding to the Revised Statutes of 1899 two new sections, to be known as sections 1194a and 1194b, which are set out in the original bills. Section 1194a gave to the commissioners (a) express power upon its own motion to "fix, establish, modify or reduce the freight rates or charges of any such road from, to or between any and all points or stations in Missouri;" (b) upon sworn complaint of shipper or a representative of any city, town or village, after notice, "to fix, establish, modify or reduce the freight rates or charges;" (c) upon failure of the railroad company to comply with any order, the commissioners were required to submit the order to the attorney general whose duty it was to enforce the order by suit in the supreme court in the name of the commissioners, who, by section 1194b, were given plenary powers to require the production of papers and to compel the attendance of wit-

nesses. Under this act, and section 2604 (Rev. Sts. 1899), the commissioners have ample power to fix all rates, subject to the condition that they shall not be in excess of a maximum adopted by the legislature as to certain kinds of traffic.

Sections 1064-1069, first adopted in 1887 (Laws 1887, pp. 103-105, secs. 3-8; Rev. Sts. 1889, secs. 2571-2576) provide for true and faithful reports to and investigation by the commissioners to see if competing railroads have consolidated or been the subject of purchase, lease or control, a violation of which is a felony, beside which there are imposed large penalties to the school fund, a third conviction to result in a forfeiture of the charter. The attorney general is charged with the special duty of enforcing this law, thus showing the general policy of the state to have one of its departments in full charge of all transportation problems.

Sections 1070 and 1071 (Rev. Sts. 1879, secs. 792, 793, Laws 1893, p. 126; Rev. Sts. 1889, secs. 2577, 2578) require, as contemplated by the constitution (Art. 12, sec. 15) all railroads to make original reports to the commissioners "in detail of the affairs * * * and of the business operations * * * together with all such information and recommendations of this state as the said commissioners may deem to be of public interest and importance," a violation of this act being made a misdemeanor.

Section 1075 was amended in 1905 (Laws 1905, pp. 107, 108) provides the location of depots at all crossing or junction of other roads, the service thereat and transfer of passengers and freight. A penalty is provided for its violation, payable to the school fund, and the prosecuting attorney is charged with the duty of enforcing it.

Sections 1087-1091 were first adopted in 1887 (Laws 1887, pp. 105-107, secs. 1-5; Rev. Sts. 1889, secs. 2593-2597). These sections require the carrier to count live stock shipped, permit

the shipper to mix his freight in one car and fix a minimum car load weight. Penalties are provided for their violation and treble damages given. It is made the duty of the commissioners "to cause" suits to be brought under the act, and the duty of the attorney general and prosecuting attorney "to institute and prosecute the same without delay, when so directed by the said commissioners."

Sections 1095 and 1096, first adopted in 1883 (Laws 1883, p. 52, secs. 1. 2; Rev. Sts. 1889, secs. 2601, 2602) forbid an advance in freight rates without 20 days notice, under a penalty of $500 to be recovered in a civil action for the benefit of the school fund, to be prosecuted by the person injured or prosecuting attorney.

Section 1120, adopted in 1887 (Laws 1887, extra session, p. 13; Rev. Sts. 1889, sec. 2624) provides that upon a failure of a railroad to furnish cars, a shipper may do so, when the company shall, under civil penalty, carry them for a reasonable compensation. In case the parties cannot agree, this may be fixed by the commissioners. A penalty of $500 is imposed for the benefit of the party aggrieved.

Sections 1128, 1129, 1130, 1133, 1135, were first adopted in 1887, Laws 1887, special session, pp. 15-17, secs. 1-5) and continued in force (Rev. Sts. 1889, secs. 2631, 2632, 2633, 2636, 2637, 2638) without change. These sections (a) declare railroads to be public highways and common carriers whose charges must be reasonable and just (Sec. 1128), (b) define and prohibit unjust discriminations (Secs. 1129-1130), but allow special rates to develop industries when approved by the commissioners (sec. 1130): (c) as amended in 1889 (Laws 1889, pp. 64, 65, secs. 2b, 2c; Rev. Sts. 1889, secs. 2639, 2640,) fix the basis for charges upon carload lots and mixed freight (secs. 1131, 1132): (d) prohibit discriminations between localities (Sec. 1134) and between long and short hauls

(Sec. 1135) and prohibit pooling (Sec. 1136). These sections must be read with sections 1136-1156, which were part of the same original act (Laws 1887, pp. 17-28, secs. 6-21; Rev. Sts. 1889, secs. 2639-2659).

Sec. 1136 first adopted in 1887 (Laws 1887, special, p. 17, Sec. 6) and continued without change in the Revised Statutes of 1889 (Sec. 2639) provides for the publication of "rates, fares and charges" not in excess of the maximum rates "which are or may hereafter be established by law." The section also provides:

> "It shall be the duty of the railroad commissioners to see that *all* schedules of rates prepared and adopted by common carriers are reasonable and just, and they may, upon complaint of any person, or upon their own motion and without complaint, make inquiry from time to time, and determine whether the schedule of rates prepared and adopted by any such common carrier is reasonable and just.

This language though found in the section providing for freight schedules is broad enough to include schedules of passenger rates. The section provides for the publication of "rates, *fares* and charges". Section 1138 adopted in 1887 (Laws 1887, Special Session, p. 19, Sec. 8) and continued in force in the Revised Statutes of 1889 (Sec. 2641) provides:

> "It shall be the duty of said railroad commissioners to see that such schedules of joint rates, *fares* and charges are reasonable and just, and that such schedules of joint rates, *fares* and charges shall be observed by all common carriers who are parties to the same. But no such common carrier, party to any such joint tariff, shall be liable for the failure of any other such common carrier, party thereto, to observe and adhere to the rates, *fares* and charges as made and published. If any such common carrier shall neglect or refuse, for a period of thirty days, to file or publish its schedules of rates, *fares* and charges, as provided for in this article or any part of the same, it shall be the duty of said railroad commissioners to make out and print a schedule or schedules

of reasonable rates for such common carrier, and deliver copy or copies of the same to such common carrier."

The word "fares" applies only to passengers.

The cost of preparing the schedule "may be recovered in an action in the name of the state at the relation of said board," and

> "A copy of such schedules so made by said board, certified by the secretary of said board, shall, in proceedings wherein is involved the reasonableness and justness of the charges and rates of such commissioners, be *prima facie* evidence that rates therein fixed are reasonable and just."

This, by the terms of section 1137 also applies to the act of 1907 as rates thereafter fixed.

Section 1139, adopted in 1887 (Laws 1887 Special Session, p. 20, Sec. 9; Rev. Sts. 1889, Sec. 2642) makes it unlawful to prevent by arrangement, means or device, continuous carriage in bulk over different roads.

Section 1140, adopted in 1887 (Laws 1887, Special Session, p. 20, Sec. 10), and continued in Revised Statutes 1889 (Sec. 2643), provides for treble damages to persons injured by any violation of the act, i. e., sections 1130-1156 (Laws 1887, Special Session, pp. 15-28, Secs. 1-21; Rev. Sts. 1889, Secs. 2632-2659) to be recovered in the circuit court as provided in section 1141 (Laws 1887, Special Session, p. 20, Sec. 11; Rev. Sts. 1889, Sec. 2644,) which section also authorizes a complaint before the commissioners who are empowered to compel the attendance as a witness of any officer or agent of the railroad, and the production of its books and papers. Section 1142 (Laws 1887, Special Session, p. 21, Sec. 12; Rev. Sts. 1889, Sec. 2645) then *adds* a penalty of $5000 for any violation of the act. Section 1143 (Laws 1887, Special Session, p. 21, Sec. 12; Rev. Sts. 1889, Sec. 2645) requires the "commissioners of this state to see that the provisions of *this article* are enforced." The words "this article" include

sections 1064-1071, 1075, 1087-1091, 1095-1096, 1120, 1128-1130, 1133, and 1156 of the Revised Statutes of 1889, sections 1-21 of the Act of 1887 (Laws 1887, Special Session, pp. 15-28), and sections 2571-2578, 2593-2597, 2601-2602, 2624, 2631-2659, of the Revised Statutes of 1889. Section 1143 authorizes inquiries upon complaint, or upon the commissioners' motion, with power on the part of the latter to summon witnesses, compel the production of books and papers, and impose penalties for contempt. Section 1144 (Laws 1887, Special Session,, p. 22, Sec. 14; Rev. Sts. 1889, Sec. 2644) requires all forfeitures and penalties *under the article* to go to the county school fund of the county where sued for, and may be recovered in a civil action in the name of the state of Missouri, *at the relation of the board of railroad commissioners* to the use of said fund." It also provides:

> "It shall be the duty of the circuit or prosecuting attorney, and such additional counsel residing in such county as said board may employ, to prosecute the same when directed by said board, and the attorneys prosecuting such suit shall receive for their services out of the amount collected by the suit, the compensation allowed by law for collections made on forfeited recognizances. The attorney general shall assist in the prosecution when directed by the board of railroad commissioners."

Section 1145 (Laws 1887, Special Session, p. 22, Sec. 14, Rev. Sts. 1889, Sec. 2648) authorizes the commission in *any* investigation to order the corporation to desist from *any* unlawful practice, to find the damage suffered by any person, and "to cause the attorney general or the prosecuting attorney of the proper county to institute suit against such common carrier in the name of the state of Missouri, at the relation and to the use of the party injured or damaged, to enforce the payment thereof, together with costs." Sections 1146-1149, (Laws 1887, Special Session, pp. 23, 25, Secs, 16-16c; Rev. Sts. 1889, Secs. 2649-2652) provides that where complaint is filed, notice shall be given

and hearing had; the commissioners shall deliver copy of the findings to the carrier, ordering it to cease or desist from any violation found; if complaint is to reduce a freight rate, ten days notice shall be given, and if rate is unreasonable the commissioners shall by order fix the rate to be charged, which "order may be revoked or modified and renewed from time to time by said board."

Section 1150 (Laws 1887, Special Session, p. 25, sec. 17; Rev. Sts. 1889, sec. 2653) provides that "where the complaint involves either private or public question," and the commissioners have made an order thereon, it may, upon the petition of the commissioners or anyone interested, be enforced by summary proceedings in the circuit court, which, if it holds the order to be unlawful, shall proceed to make such order as it thinks should have been made. The section also provides:

> "Whenever any such petition shall be filed by the commissioners as aforesaid, it shall be the duty of the attorney general, when requested by said commissioners, to prosecute the same. * * * The cost of such proceeding may be, with the approval of the attorney general and governor of the state, when such suit is brought by any private person, and when brought by said commissioners shall be ordered by the commissioners to be paid, in the first instance, out of any money in the treasury not otherwise appropriated."

Under section 1152 (Laws 1887, Special Session, p. 27, Sec. 18; Rev. Sts. 1889, Sec. 2655) the court is authorized to modify any order made under section 1151. Section 1153 (Laws 1887, Special Session, p. 28, Sec. 19; Rev. Sts. 1889, Sec. 2656) provides that shipments to and from points within a state, but passing out of and then into the state were state and not interstate traffic. This section is, however, contrary to the federal constitution (*Hanley* v. *K. C. S. R. Co.*, 187 U. S., 617, 47 L. Ed., 333.) Sections 1154 and 1155 (Laws 1887, Special Session, p. 28, Secs. 20, 20a; Rev. Sts. 1889, Sec. 265-7-8) make the commissioners subject to mandamus and fine if they shall fail or refuse to per-

form any act or duty required of them by "this article," i. e., Article 2, Chapter 12, sections 1064, 1071, 1075, 1087-1091, 1095-6, 1120, 1128-1130, 1133-1156. Section 1156 (Laws 1887, Special Session, p. 28, Sec. 21; Rev. Sts. 1889, Sec. 2659) significantly provides:

> "This article is not intended to repeal any law now in force, unless in direct conflict therewith, but is intended to be supplemental to such laws."

Thus the different provisions were made supplemental to both passenger and freight provisions found in Article IV as sections 1191-1209, already shown to have been in force since 1879 (Rev. Sts. 1879, Secs. 831-847, 889, Secs. 2672-2689.) In 1907, the legislature designedly left out of the maximum passenger (Laws 1907, p. 170) and freight (id. 172) rate acts provisions imposing special duties, with the idea of defeating federal courts of jurisdiction, and then attempted by a separate law (Laws 1907, pp. 386-387) to prevent temporary injunctions in the state courts, and to make a supersedeas upon appeal a thing not to be sought.

Express companies are, by section 1516 (Laws 1893, p. 122), declared to be common carriers required (Sec. 1516) to file a schedule of rates, with the power in the railroad commissioners to fix a maximum schedule (Sec. 1518) and investigate complaints (Sec. 1520). Rebates and discriminations by express companies are prohibited (Sec. 1519), a violation of any provision of the act to be prosecuted (Sec. 1521-2), by the attorney general. This shows an intention to put the whole transportation problem in the hands of the commissioners and the attorney general. So the commissioners are empowered to compel equal facilities to be given to all express companies, to enforce the provisions relative thereto (Secs. 1157-1158) and through the attorney general and prosecuting attorneys to prosecute (Sec. 1519) suits for a violation of sections 1157, 1158.

IX.

Costs were improperly taxed against the railroad company.

(a) The court below (Rec. 5304) said:

> "Each party will pay the costs by such party made, except the compensation of the master and stenographer. The half of those will be paid by complainants, and the other half by respondents."

The original decree (Rec. 5243) provided:

> "The taxable costs of the case including those covered by orders of the court, heretofore made or hereafter made on motion to tax or re-tax, including printing bill of Buxton-Skinner Stationery Company, shall be paid as follows, to-wit: The one-half by complainant and the other half by defendants to be recovered by execution to be issued by the clerk of this court upon application of any party in interest."

A motion was filed (Rec. 5244-5245) to change the decree in this respect, asking the court:

> "3. To strike from paragraph 11 of the opinion these words: 'Each party will pay the costs by such party made, except the compensation of the master and stenographer. The half of those will be paid by complainants, and the other half by respondents.' This, for the reason that it is contrary to the rules and principles of law and equity and good conscience.
>
> 4. To modify the decree so far as it taxes any costs against complainant, and to re-tax the same, for that there is no reason in equity or good conscience to tax same against it."

In an amended motion (Rec. 5245-5246) this ground of complaint was thus amplified:

> "To set aside the provision of said decree as to costs, for that the attempt in the decree to cure the error already rendered in taxing the costs is erroneous. In the original opinion the decision was that each party should pay the costs by such party made, except the compensation of the master and stenographer, half of which should be paid by complainants and the other half by defendants. In open court it was announced

that such rule was adopted solely because the defendants were state officers and the state might not appropriate the amount necessary to meet these costs. The supreme court has twice decided this is no excuse and no justification for taxing the cost against the other party. It was conceded by both parties that those shippers who adopted the defense of the state officers and were defended by them ought not to be compelled to pay any additional costs. This concession was agreed to by the court; yet, in the decree as now entered, this concession of both sides and the court, is absolutely ignored. The only change made as to the costs is that one-half of all the costs shall be paid by each party. There is no legal excuse or justification to tax any of these costs to complainants; ample money has already been appropriated to the state officers for the purpose of paying the same, and even if it had not been so appropriated, this would have been no reason for making an order that complainant should pay costs."

The court belaw (Supplemental opinion, Rec., 5327, 5328) thus disposed of these motions:

"These cases are pending on a motion to modify the decrees and opinion filed March 8th, 1909.

1. The costs were taxed, the one-half to the railway companies, and the one-half to the state officers. The company being successful, it is contended that the taxable costs aggregating about eighteen thousand dollars should all be adjudged against the state officers. In actions at law, in the absence of a tender or statutory offer to confess judgment, the costs follow the judgment. In equity cases such is the general rule, but not the invariable one. The award as to costs is discretionary. Two things influenced the court in dividing the costs herein.

First. Defendants are officials, and as officials are representatives. They have no personal interest in the litigation. This of itself is not enough to avoid the costs, but it is to be considered. It will be presumed that the legislature will appropriate a sufficient amount to protect these officers. But this is not always done. The last legislature appropriated $40,000.00 for these cases, which was but two-thirds enough for the two years. The Master in Chancery and the lady stenographer gave a great deal of time, followed by very large, but justly owing bills, the one-half of which has been paid by the railways, and by the state nothing with the ap-

propriation exhausted. Whether the other half is paid all depends upon what the legislature does.

Second. The more sufficient reason for dividing the costs is because of the extravagantly enormous record made in the cases. The Master gave many weeks to taking evidence, and many more weeks were given by the court in taking evidence. Both the Master and the Court were powerless to abbreviate the record, because the Supreme Court in the case of *Blease* v. *Garlington*, 92 U. S., 1, and the Circuit Court of Appeals for this Circuit, in case of *Schubert* v. *Woodward*, 167 Fed. Rep., 47, 52, have held that trial courts must receive in equity cases all evidence offered that is germane to the issues. I complained, and in effect gave warning many times to the parties, but without avail, because of the prolixity of the record. Something like 15,000 pages of evidence were taken, when one-third would have been as strong a presentation of either side. Courts should impose penalties for this, and the only penalty is by way of costs. Both sides were at fault, and both sides should bear the burden. It does not follow that such a precedent will be one of plague. It is not a precedent to be followed except in cases where it ought to be followed."

The cross appeal seeks to review the action below in this repect.

(b) Where a case is here upon an appeal involving its merits, the action of the court below in taxing costs is a subject of review.

In *Burns* v. *Rosenstein*, 135 U. S., 449, 456, 34, L. Ed., 193, 196, Mr. Justice Harlan said:

"It was said in *Florida Int. Imp. Fund* v. *Greenough*, 105 U. S., 527 (26: 1157), that 'ordinarily a decree will not be reviewed in this court for costs merely in a suit in equity, although the court has entire control of costs as well as the merits where it has possession of the case on appeal from final decree.'"

In *Citizens Bank* v. *Cannon*, 164 U. S., 319, 323, 41 L. Ed., 451, 453, Mr. Justice Shiras said:

"As a general thing, an appeal will not lie in the matter of costs alone. But such appeals have been sustained in par-

ticular circumstances, as, for instance, where the costs have been directed to be paid out of a trust fund. In *Internal Improv. Fund* v. *Greenough*, 105 U. S., 528 (26:1158), this court said, through Mr. Justice Bradley, that the objection to an appeal on the ground of its being from a decree for costs only, is untenable. However, in the present case, the appeal was not taken from the decree on the sole ground that costs were wrongfully awarded, and, as the entire decree is before us, it is competent for us to consider whether, when a circuit court dismisses a suit for want of jurisdiction, it can give a decree for costs, including a fee in the nature of a penalty, to the defendants' counsel."

In *O'Reilly* v. *Morse*, 15 How., 62, 124, 127, 14 L. Ed., 601, 628, 632, a decree below as to costs, reviewed with the merits, was reversed. So the rule was applied in *Nashville* v. *Cooper*, 6 Wall., 250, 18 L. Ed., 852; *Inglee* v. *Coolidge*, 2 Wheat., 363, 4 L. Ed., 261; *Hornthal* v. *Keary*, 9 Wall., 566, 19 L. Ed., 562.

(c) The legislature in 1907 (Laws Mo. 1907, p. 13, sec. 61; Rec., 5281) appropriated $20,000, and in 1909 (Laws Mo. 1909, p. 5, 6, sec. 7c, 7d, 7e; Opinion, Rec., 5327) over $40,000 for the expenses of this and the companion rate cases. There was, therefore, no difficulty in the state making payment of costs. But if the appropriation had not been made, this was no reason for not assessing costs against the state officers. Judge McPherson was wrong in entertaining a contrary view. In *U. S.* v. *Boutwell*, 17 Wall., 604, 21 L. Ed., 721, 722, Mr. Justice Strong, in dealing with the same question, among other things, said:

> "Thus it is the personal default of the defendant that warrants impetration of the writ, and if a peremptory mandamus be awarded, the costs must fall upon the defendant."

In *U. S.* v. *Schurz*, 102 U. S., 407, 26 L. Ed., 219, Mr. Justice Miller said:

> "In this case, a motion is made to modify the order that each party should pay his own costs and give the plaintiff his

costs against the defendant. Our first impression was that as the defendant was sued in regard to the manner in which he had discharged certain official duties as Secretary of the Interior, in which no intentional wrong was charged or proven against him, it would be unjust to make him pay the costs of the proceeding, out of his own pocket. But a careful examination of the authorities leaves us no option but to follow the rule that the pervailing party shall recover of the unsuccessful one the legal costs which he has expended in obtaining his rights. In the case of *Kendall* v. *U. S.*, 12 Pet., 524, which is the leading case establishing the right of a citizen to the use of the writ of mandamus to compel a public officer to perform a duty merely ministerial, the relator recovered his costs. The duty in that case, as in the present, was one demanded of a cabinet officer, namely: The Postmaster-General, and which he refused to perform. It is obvious that he thought he was right in refusing to do the act demanded of him, yet this court, as shown by the report of the case, rendered judgment for costs against him In the case of *U. S.* v. *Boutwell*, 17 Wall., 604 (84 U. S., XXI., 721), which was the case of a writ of mandamus against Boutwell, as Secretary of the Treasury, and which the court held to be abated by his retirement from office, it was said: 'It is the personal default of the defendant and that warrants the impetration of the writ, and if a peremptory writ of mandamus be rewarded, the costs must fall upon the defendant.' And it is argued that as it would be unjust to make the successor in office of the delinquent secretary pay the cost of defending the action of his predecessor, the writ must of necessity abate. We cannot in the face of these cases, refuse the order for costs, however much we might wish it were otherwise. There may be a contingent or other fund of the department out of which these costs can be paid. If there is no such provision, Congress may provide for it or enact generally that when the officers of the government are sued with reference to the manner in which they have performed or failed to perform their official duties, they would be relieved from expense of the suit if they have acted with good motives and upon reasonable grounds as in revenue seizures and similar cases."

(d) The state's one-half of the costs was $9,000 (Laws Mo. 1909, p. 6, sec. 7e). The long record was not made by the railroads. About three out of four pages of the testimony of witnesses was made up of needless cross examination as to figures,

when the state's experts conceded them to be correct. If there ever was a case where costs should have been taxed it should have been here. Every effort was made to evade the jurisdiction and defeat the decrees. When the law of 1905 was repealed, a wrongful attempt was made to keep the penalties in force. For this reason only, it was necessary to use the evidence before the Master. The court below thought there should be a division because of the large amount of evidence taken before the master. Ignoring the fact that it was only used by consent and related solely to the rates under the act of 1905. The state needlessly kept in existence the litigation as to the act, and the railroad company should not be charged with expense upon account thereof. When the trial was had and the state's experts fully conceded the correctness of the figures, there was no need to use the large part of that testimony taken before the master produced by the state upon original and cross examination. Here, harsh and unreasonable laws were passed; delays were sought; jurisdiction attempted to be evaded. If state officers can so conduct themselves and when defeated be rewarded by the allowance of costs, encouragement is lent to the destruction of property, and the outcry against the lawful action of judicial tribunals. The amount is not great, but the principle involved is such that we deem it a duty to present it. The reasons given by the learned judge below do not justify the taxation of costs against a complainant and the decree in this respect should be reversed.

Respectfully submitted,

O. M. SPENCER,
FRANK HAGERMAN,
Solicitors for C., B. & Q. R. Co.

APPENDIX 1.

"Section 1194a. The board of railroad and warehouse commissioners are hereby authorized, empowered and required to fix maintain and establish just and reasonable freight rates on all classes of freights, from, to and between all points and stations upon and along all lines of railroads in this state; and said board is authorized and empowered to reduce, change or modify any and all such freight rates so fixed and established as hereinafter provided. And said board may, of its own motion, and shall, upon the sworn complaint of any shipper, mayor, councilman, alderman, or trustee of any city, town or village, first giving five days' written notice to the railroad company affected, or complained against, proceed to fix, establish, modify or reduce the freight rates or charges of any such road from, to or between any and all points or stations in Missouri; and any and all orders fixing, establishing, modifying or reducing any such freight rates or charges shall be the judgment of said board and constitute the legal rates or charges that such railroad company may collect for the transportation of freight from, to and between its stations in Missouri; and said board shall, immediately upon the fixing, establishing, modifying or reducing the freight rates or charges of any railroad company, notify such railroad in writing thereof; and said railroad shall comply with the orders and judgments of said board with reference to such freight rates or charges, within ten days after such notice. And if any railroad fails, refuses or neglects to put the rates so ordered by said board into effect and operation within ten days after notice, the board shall submit a certified copy of its order to the attorney-general of the state, with notice that such railroad (designating the same), has failed to comply therewith, And the attorney general, upon receipt thereof, shall immediately institute suit in the name of said board of railroad and warehouse commissioners against such railroad, in the supreme court of the state, by mandamus or other proper remedy, to enforce said order of said board.

Section 1194b. All railroad companies doing business in this state shall, upon the request of the board of railroad and warehouse commissioners, furnish to said board copies of all its schedules of freight rates and charges, and all other papers and docu-

ments, including bills of lading and contracts for transportation of freight affecting in any way the transportation of freight within, into and from this state. And said board shall have full power and authority to examine all officers, agents and employes of said railroad companies, and all other persons, under oath or otherwise, to procure the necessary information to make just and reasonable freight rates or charges, and to ascertain if the freight rates so fixed by said board are being observed or violated. And said board shall have power to administer oaths, to issue subpoenas for the persons and papers, examine witnesses and to enforce the same in like manner as the circuit courts of this state. And in the issuance and enforcement of the papers and process above, the jurisdiction shall be co-extensive with the state."

APPENDIX 2.

"An act, entitled 'An act to amend chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled "Corporations, private," by repealing section 1194 of said Revised Statutes, being part of Article IV of said chapter concerning railroad classification—charges—commissioners, and to enact in lieu thereof the following new sections providing for the regulation of freight charges by railroads and the recovery of penalties for the violation thereof.'

Section 1. Repeals section 1194 and enacts three other sections in lieu.

Section 1194. Fixes maximum freight rates.

Section 1194a. Penalty for violation.

1194b. Repeals conflicting acts, rules and regulations.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. That section 1194 of the Revised Statutes of Missouri, 1899, concerning the regulation of freight charges, being part of Article IV. of chapter 12, entitled 'Corporations, private,' be and the same is hereby repealed and the following, to be known as sections 1194, 1194a, 1194b, of said Revised Statutes, be enacted in lieu thereof, so that said sections shall be collocated between the existing sections 1193 and 1195 of said Revised Statutes of 1899.

Section 1194. No individual, company or corporation owning, operating, managing or leasing any railroad or part of railroad, designated in section 1191 as in classes A, B or C, shall demand, charge or receive a greater or higher rate for carrying from initial to terminal points in this state articles named in the several classes herein designated, than is hereinafter provided for, namely: Class D, in car loads of 40,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first 25 miles and not exceeding one-half cent per hundred pounds for the second 25 miles, or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional 25 miles or fractional part thereof. Class E, in car loads of 24,000 pounds minimum weight not exceeding 5 cents per one hundred pounds for the first 25 miles and not exceeding one-half cent per hundred pounds for the second 25 miles, or fractional part thereof, and

not exceeding one-half cent per hundred pounds for each additional 25 miles or fractional part thereof. Class F, in car loads of 30,000 pounds minimum weight, not exceeding 5 cents per one hundred pounds for the first 25 miles and not exceeding one-half cent per hundred pounds for the second 25 miles, or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional 25 mile or fractional part thereof. Class G, in car loads of 30,000 pounds minimum weight, not exceeding 5 cents per one hundred pounds for the first 25 miles and not exceeding one-half cent per hundred pounds for the second 25 miles, or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional 25 miles, or fractional part thereof. Class H, in car loads in common cars, measuring inside from 29 feet to and including 30 feet and 6 inches in length (to be known as standard cars) not exceeding $6.00 per car load for the first 25 miles, and not exceeding $3.00 per car load for the second 25 miles, or fractional part thereof, and not exceeding $2.00 per car load for each additional 25 miles, or fractional part thereof, of over twelve miles. For the carriage of any of the articles comprising class H in cars of other length for the distances above specified, the following percentages of the foregoing rates per car load shall not be exceeded, namely: In cars of length less than 29 feet, 94 per cent; in car of length over 30½ feet to and including 32 feet, 104 per cent; in cars of length over 32 feet to and including 33 feet and 9 inches, 107 per cent; in cars of length over 33 feet and 9 inches to and including 36 feet, 110 per cent; in cars of length over 36 feet to and including 38 feet, 113 per cent; in cars of length over 38 feet to and including 40 feet, 116 per cent; in cars of length over 40 feet to and including 42 feet, 125 per cent; in cars of length over 42 feet to and including 44 feet, 135 per cent; in cars of length over 44 feet, 140 per cent of the rates herein specified for cars of the standard length of 29 feet to and including 30 feet and 6 inches, shall not be exceeded. All the foregoing lengths to be taken by inside measurements. Class 1, in car loads of 20,000 pounds minimum weight, not exceeding $14.00 per car load for the first 25 miles and not exceeding $2.00 per car load for the second 25 miles, or fractional part thereof, and not exceeding $2.00 per car load for each additional 25 miles, or fractional part thereof. (Class) In computing the rate of freight according to the provisions of this article, the distance shall be computed from the point where it is received to the point of destination in the state, notwithstanding it may pass from one road to another.

Section 1194a. That for the violation of the foregoing sections the railroad company so offending shall forfeit and pay to

any person thereby affected the freight rate charged, demanded, or received in excess of the rates prescribed in said section, together with all actual damages caused thereby, to be recovered in any court having jurisdiction thereof by the existing law. And (if) the plaintiff in such action recover judgment therein, the court shall treble the same and the plaintiff shall on motion be allowed a reasonable attorney's fee for bringing the action.

Section 1194b. All acts and parts of acts, and all rules and regulations, freight schedules, classifications and groupings by railroad companies or the railroad and warehouse commissioners of this state in conflict with the provisions of this act are hereby repealed and declared void."

Approved April 15, 1905."

APPENDIX 3.

"An act to repeal an act of the 43rd general assembly, approved April 15, 1905, entitled 'An act to amend chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled "Corporations, private," by repealing section 1194 of said Revised Statutes, being part of Article IV of said chapter, concerning railroad classification, charges, commissioners, and to enact in lieu thereof the following new sections providing for the regulation of freight charges by railroads and the recovery of penalties for the violation thereof,' and to repeal an act of the 43rd general assembly, approved April 14, 1905, entitled 'An act to amend Article IV, chapter 12, of the Revised Statutes of Missouri, 1899, entitled "Railroad classifications, charges, commissioners,' by adding a new section thereto, to be known as section 1195a, fixing the charges for carrying undressed stone, crushed rock and building or paving brick,' and to enact in lieu thereof certain new sections, to be known as sections 1194, 1194a-1, 1194b-1 and 1194c-1, providing for the regulation of freight charges by railroads and prescribing the punishment for a violation thereof, which new section shall read as follows:

Section 1194. Classification and charges for carrying freight in car load lots.

1194a. Penalty for violation.

Section 1194b. Not to relieve railroad from complying with other laws.

1194c. Repealing conflicting acts.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI AS FOLLOWS:

Section 1. That section 1194, 1194a and 1194b of an act of the 43rd general assembly, approved April 15, 1905, concerning railroad classifications, charges, commissioners, and providing for a penalty for a violation thereof, said sections being enacted in lieu of section 1194, chapter 12 of the Revised Statutes of Missouri, 1899, in 'corporations, private,' and section 1195a of an act of the 43rd general assembly, approved April 14, 1905, concerning railroad classifications, charges, commissioners, fixing charges for carrying undressed stone, crushed rock and building or paving brick, be and the same are hereby repealed, and the fol-

lowing to be known as section 1194, 1194a-1, 1194b-1, and 1194c-1 of said Revised Statutes, are enacted in lieu thereof:

Section 1194. No individual, company or corporation owning, operating, managing or leasing any railroad, or part of railroad, designated in section 1191 as in classes A, B or C, shall demand, charge or receive a greater or higher rate for carrying from initial to terminal points in this state articles named in the several classes and the commodities herein designated than is hereinafter provided for, namely: Class D, in car loads of 40,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first twenty-five miles, and not exceeding one-half cent per hundred pounds for the second twenty-five miles, or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class E, in car loads of 24,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first twenty-five miles, and not exceeding one-half cent per hundred pounds for the second twenty-five miles or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class F, in car loads of 30,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first twenty-five miles, and not exceeding one-half cent per hundred pounds for the second twenty-five miles or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class G, in car loads of 30,000 pounds minimum weight, not exceeding five cents per one hundred pounds, for the first twenty-five miles, and not exceeding one-half cent per hundred pounds for the second twenty-five miles or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class H, in car loads, in common cars, measuring inside from 29 feet to and including 30 feet and 6 inches in length (to be known as standard cars), not exceeding $8.00 per car load for the first twenty five miles, and not exceeding $4.00 per car load for the second twenty-five miles or fractional part thereof, and not exceeding $2.00 per car load for each additional twenty-five miles or fractional part thereof of over twelve miles. For the carriage of any of the articles comprising class H, in cars of other lengths for the distances above specified, the following percentages of the foregoing rates per car load shall not be exceeded, namely: In cars of length less than 29 feet, 94 per cent; in cars of length over 30½ feet to and including 32 feet, 104 per cent; in cars of length over 32 feet to and including 33 feet and 9 inches, 107 per cent; in cars of length over 33 feet and 9 inches to and including

36 feet, 110 per cent; in cars of length over 36 feet to and including 38 feet, 113 per cent; in cars of length over 38 feet to and including 40 feet, 116 per cent; in cars of length over 40 feet to and including 42 feet, 125 per cent; in cars of length over 42 feet to and including 44 feet 135 per cent; in cars of length over 44 feet, 140 per cent of the rates herein specified for cars of the standard length of 29 feet to and including 30 feet and 6 inches shall not be exceeded. All the foregoing lengths to be taken by inside measurements. Class I, in car loads of 20,000 pounds minimum weight, not exceeding $14.00 per car load for the first twenty-five miles, and not exceeding $2.00 per car load for the second twenty-five miles or fractional part thereof, and not exceeding $2.00 per car load for each additional twenty-five miles or fractional part thereof. For a car load of 40,000 pounds minimum weight undressed stone, crushed rock, sand, railroad ties, cordwood, building or paving brick, not exceeding 40 cents per ton of 2,000 pounds to the ton for the first fifty miles or fractional part thereof, and not exceeding five cents per ton per car load for the next ten miles or fractional part thereof, and not exceeding 5 cents per ton per car load for each additional ten miles or fractional part thereof. In computing the rate of freight, according to the provisions of this article, the distance shall be computed from the point where it is received to the point of destination in the state, notwithstanding it may pass from one road to another.

Section 1194a. Any individual, company or corporation owning, operating, managing or leasing any railroad, or part of railroad, designated in section 1194, or any officer, agent, representative or employe thereof who violates the provisions of section 1194, shall be adjudged guilty of a misdemeanor, and on conviction, shall be punished by a fine of not to exceed $5,000.00: Provided, that the money received from any fine under the provisions of this act shall be paid into the school fund in the county in which the case is prosecuted.

Section 1194b. This act shall not have the effect of relieving any person, partnership or corporation, owning or operating any railroad in this state from any liability or penalty heretofore incurred for failure to comply with any law of this state.

Section 1194c. All acts and parts of acts, and all rules and regulations, freight schedules, classifications and groupings by railroad companies, or the railroad and warehouse commissioners of this state, in conflict with the provisions of this act, are hereby repealed and declared void.

Approved March 19, 1907."

APPENDIX 4.

"AN ACT to amend article 4, chapter 12, Revised Statutes of Missouri of 1899 by adding a new section thereto, to be known as section 1195a, and relating to freight charges and classifications.

SECTION

1. Fixing freight charges on fruits.
2. Inconsistent acts repealed.
3. Penalty for violation.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI, AS FOLLOWS:

Section 1. That article 4, chapter 12, of the Revised Statutes of Missouri, 1899, entitled 'Railroad classification, charges, commissioners,' be and the same is hereby amended by adding a new section thereto, to be known as section 1195a, which said section shall read as follows:

Section 1195a. No individual, company or corporation owning, operating, managing or leasing any railroad or part of railroad in this state, shall charge for or receive for carrying apples and pears in car loads of 24,000 pounds minimum weight, more than six cents per hundred pounds for the first twenty-five miles or fractional part thereof, and not more than one cent per hundred pounds for each additional twenty-five miles or fractional part thereof. For strawberries, peaches, grapes and other berries in carloads of 18,000 pounds minimum weight, not exceeding fifteen cents per hundred pounds for the first twenty-five miles or fractional part thereof, and not exceeding two cents per hundred pounds for each additional twenty-five miles or fractional part thereof.

SEC. 2. All acts and parts of acts and all rules and regulations, freight schedules, classifications and groupings by railroad companies, or the railroad and warehouse commissioners of this state, in conflict with the provisions of this act, are hereby repealed and declared void.

SEC. 3. Any individual, company or corporation owning, operating, managing or leasing any railroad or part of a railroad in this state, violating the provisions of this act, shall, on conviction, be adjudged guilty of a misdemeanor, and subject to a fine not to exceed one thousand dollars for each offense.

Approved March 19, 1907."

APPENDIX 5.

"An Act to provide transportation on railroads for the shippers of freight in this state in carload lots.

SECTION 1. Railroads to issue to certain shippers transportation.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI, AS FOLLOWS:

SECTION 1. Whenever any railroad company or corporation doing business within the limits of this state shall receive any live stock to be shipped over the said road or roads by carload lots, said corporation shall, in consideration of the price paid for said carload lots, issue to the shipper, his agent or employe, at the time of making out the contract or bill of lading, a round trip ticket to and from said points designated in said bill of lading, without further expense to said shipper, provided that the points of destination are within this state, and in case said point of destination is without this state, then said railroad corporation shall issue to such shipper, his agent or employe a round trip ticket to a point within this state nearest to the point without this state to which said shipment of live stock is shipped: Provided, that in case said shipper shall ship more than one car load at any one shipment the said railroad corporation shall not be compelled to give to said shipper more than one round trip ticket with such shipment, which said ticket shall be good on the freight train on which said stock is shipped, and on all trains on said road carrying passengers on the return trip, and shall be good for a period of ten days, and any railroad company or corporation willfully violating the provisions of this section, or which shall fail, neglect or refuse to furnish and deliver such ticket to such shipper, his agent or employe, shall forfeit and pay, as a penalty, to said shipper, not less than three hundred dollars nor more than five hundred dollars, to be recovered by civil action in any court of competent jurisdiction.

Approved April 4, 1907."

APPENDIX 6.

"Sec. 1191. ROADS CLASSIFIED.—All railroads in the state of Missouri are hereby divided into three classes, to be known as class A, class B and class C. Class A shall include all through or trunk line railroads. Class B shall include all of the branch roads owned, leased or occupied by such through or trunk line railroad companies or corporations. Class C shall include all other railroads or parts of railroads owned, leased or occupied, or which may hereafter be owned, leased or occupied in this state, either wholly or in part.

Sec. 1192. PASSENGER CHARGES REGULATED.—Any individual, company or corporation owning, operating, managing or leasing any railroad or part of a railroad in this state, in the several classifications as herein prescribed, shall be limited to a compensation per mile for the transportation of any person with ordinary baggage not exceeding one hundred pounds in weight, as follows: In class A, not exceeding three cents per mile, and in classes B and C not exceeding four cents per mile: *Provided*, that no such individual, company or corporation shall charge, demand or receive any greater compensation per mile for the transportation of children of the age of twelve years or under, than one-half of the rate above prescribed; *and provided further* that the rates for transportation herein prescribed may be reduced, as hereinafter provided."

APPENDIX 7.

"AN ACT to repeal sections 1191 and 1192 of chapter 12, article 4, Revised Statutes of Missouri, 1899, entitled 'Railroad classification-charges-commissioners,' by striking out sections 1191 and 1192 and enacting the following new sections in lieu thereof to be known as sections 1191 and 1192 and 1192a.

SECTION 1191. Classification of railroads.

SECTION 1192. Passenger charges regulated.

SECTION 1192a. Penalty for violation.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI, AS FOLLOWS:

Section 1. That all of sections 1191 and 1192 of chapter 12, article 4, of the Revised Statutes of Missouri, 1899, be and the same are hereby repealed and three new sections be enacted in lieu thereof, to be known as sections 1191 and 1192 and 1192a, so that said sections shall read as follows:

Section 1191. Roads Classified.—All railroads in the state of Missouri are hereby divided into four classes, to be known as class A, class B, class C and class D. Class A shall include all through or trunk line railroads and all branch roads owned, leased, controlled or occupied by such through or trunk line railroad companies or corporations. Class B shall include all other railroads or parts of railroads owned, leased, controlled or occupied, or which may hereafter be owned, leased, controlled or occupied, either wholly or in part, by any trunk line company or corporation. Class C shall include all other railroads of a greater length than forty-five miles. Class D shall include all roads less than forty-five miles in length not owned, leased, controlled or occupied by any trunk line company or corporation.

Section 1192. Passenger charges regulated.—Any individual, company or corporation owning, operating, controlling or leasing any railroad or part of a railroad in this state, in the several classifications as herein prescribed, shall be limited to a compensation per mile, for the transportation of any person with ordinary baggage not exceeding one hundred pounds in weight, as follows: In classes A, B and C, not exceeding two cents per mile, and in class D, not exceeding four cents per mile: Provided, that no such individual, company or corporation shall charge, demand or receive any greater compensation per mile for the transportation of children of the age of twelve years or under than one-half of

the rate above prescribed; and provided further, that the rates for transportation herein prescribed may be reduced, as hereinafter provided.

Section 1192a. Any individual, company or corporation, or any agent or officer thereof, who shall violate any of the provisions of section 1192 of this act, shall be deemed guilty of a misdemeanor, and upon conviction, shall pay a fine of not less than one hundred nor more than five hundred dollars.

Approved February 27, 1907."

APPENDIX 7A.

"Sec. 1136. Schedule of maximum rates posted in depots—duty of commissioners. Every such common carrier shall print and keep for public inspection schedules showing the rates for freight which such carrier has established and which are in force at the time upon the railroad or railroads operated by it as defined in section 1128. Said rates shall be reasonable and just, and shall not in any case exceed the maximum rates which are or which may hereafter be established by law. Schedules as aforesaid shall contain the classifications of freight in force upon such railroad or railroads, and if there be any rules or regulations which change, determine or affect any part of the aggregate of such rates, fares and charges, such rules and regulations shall accompany such schedule. Copies of such schedules, also such rules and regulations, if any, shall be kept posted in every depot or station upon any such road in such place where the same can be conveniently inspected by every person interested in the same. Copies of such schedules, also such rules and regulations, if any, shall be filed with the railroad commissioners of the state of Missouri, and from the date of such filing, the rates, fares and charges specified in such schedule, not being in excess of any statutory maximum rates now or that may hereafter be in force, shall be deemed the established rates, fares and charges of such common carrier until the same is changed as in this article provided. No advance shall be made in the rates, fares and charges which have been established and published as aforesaid by any such common carrier in compliance with the requirements of this article, except after ten days' public notice which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares and charges will go into effect; and the proposed changes shall be plainly indicated upon the schedules in force at the time, and kept for public inspection in like manner as herein provided. Reductions in such published rates, fares and charges may be made without previous public notice, but whenever any such reduction is made, notice of the same shall be immediately publicly posted, and the changes made shall be immediately plainly indicated upon the schedules in force at the time and kept for public inspection, and copies of the schedules containing such changes shall be forthwith filed with said railroad

commissioners. Such changed schedules shall become the established schedules from the date of such public notice until changed as herein provided for changing schedules of rates, fares and charges. When any such common carrier shall have established and published its rates, fares and charges in compliance with the provisions of this article, the same not being in excess of any statutory maximum rates now or that may be hereafter in force, it shall be unlawful for any such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of property or for any service in connection therewith than is specified in such published schedule of rates, fares and charges as may at the time be in force, except as herein may be specifically permitted. It shall be the duty of the railroad commissioners to see that all schedules of rates prepared and adopted by common carriers are reasonable and just, and they may, upon complaint of any person, or upon their own motion and without complaint, make inquiry from time to time, and determine whether the schedule of rates prepared and adopted by any such common carrier is reasonable and just. (R. S., 1899.)

APPENDIX 8.

ORAL OPINION IN MAXIMUM FREIGHT RATE CASES.

KANSAS CITY, Mo., July 12, 1905.

Philips, J.---Gentlemen, in these case of the railroads against the state officers, commissioners and others, known as the "Maximum Freight Rate cases," the court has to say that on a conference between Judge McPherson and myself, after these cases were submitted on preliminary hearing, it was concluded to express nothing more than a mere tentative opinion, reserving more definite conclusions until the final hearing of these cases.

On some of the questions I do not care to express an opinion at this time other than give our first impressions arising on preliminary questions.

The first objection that is made to the bills is that the actions are premature. That until the railroad commissioners take some affirmative action in the way of establishing a schedule of rates under the provisions of the general statutes applying not only to the classified objects or subjects mentioned in the Act of the Legislature, but also as to other schedules not included in the carload rate fixed by the act. That it is impossible to determine even apparently in the first instance, whether the maximum rates fixed on these articles is excessive or not, and that until that is done, there is no probability or small possibility of any affirmative action being taken by those in authority or in position to claim against the offending carriers.

With respect of that it seems to us to be sufficient to say that by the provisions of the existing statute, paricularly Section 1136 of the General Statutes of Missouri, it makes it the duty of the carrier at once, and makes the carrier amenable to the rate of 1905, because he is a party to the proposed schedule, which will not exceed the maximum rate fixed by law or which may hereafter be fixed.

The railroad commissioners have no function to perform, or rather no power, so far as they are concerned, to fix a rate that is in excess of the maximum rate, because that is fixed by law—by statute—and the carrier at once becomes amenable to the penalty prescribed for violating this statute, and at once becomes amenable to action by the railroad commissioners, or by the state

officers to proceed against them in the event they should exact for carriage of any of the prescribed articles a greater rate than that fixed as the maximum. So that, without any action at all, the moment that the carrier should demand or receive from the shipper a higher rate than the maximum prescribed in this statute, it becomes amenable to the law, and it certainly is the right of the carrier to have the question determined as a matter of law as to whether he is amenable to that statute or not.

It seems to me that he ought to be permitted to take that action to test the validity of that rate established by law as much so as if it had been established by affirmative order of the railroad commissioners, the right to complain of it because it interferes daily and hourly with the shipments that he may propose to make over and above that maximum rate, that is, independent of any action that the railroad commissioners may take in the matter of establishing a schedule of rates for the railroad companies.

It is next objected that inasmuch as in determining the question of fact as to whether the maximum rate fixed by the legislature upon a specified article by the car load is oppressive or confiscatory of the property of the railroad company, we must take into consideration the whole earnings of the railroads; the amounts realized on all classes of shipments; so that while it may be true that the maximum rate fixed by the statute for shipping the particular specified articles may be low and independently considered, carriage could not be made without sacrifice or loss to the carrier, yet, in determining whether or not the railroads are to suffer as a result, we must take into consideration all the rates established by the schedules approved by the railroad commissioners.

In other words, as it seems to us to be the logical sequence of the argument made by counsel for the respondents in this case, that the railroad commissioners, if they should ascertain that the maximum rates established by this act were too low, they might average their schedule by increasing the rates on other articles than those specified in the act of the legislature.

In answer to that it occurs to the court that the bills in this case not only aver but that would be implied, that the existing rates specified in the schedules of carriage and which presumptively had the approval of the railroad commissioners, are reasonable rates on all articles as heretofore understood, and that by 'reasonable rates' implies such as do not unduly burden the shipper and such as do not unduly increase the income of the railroads. They are reasonable in the meaning of the constitution. The presumption, therefore, it seems to us, is to be indulged on this preliminary hearing, that those rates are to be maintained until changed by order of the railroad commissioners, and if, as the bill

charges (and that fact is conceded on this hearing) that they cannot carry the articles specified in the legislative Act of 1905 without loss, not only without profit to the railroad companies, but with an absolute loss for carrying it, would not cover the expenses of transportation, all things considered, for the purpose of this bill, it is to be assumed that the rates existing on the other articles being reasonable, the presumption is that they will be maintained until it is altered by the railroad companies.

I might observe in this connection that while it is true that the courts in determining the question as to the reasonableness or unreasonableness of these rates prescribed by legislative acts, agree that a great many questions enter into the consideration and determination of that matter, that is the reasonableness and unreasonableness, you must take into account what it earns on all articles carried and shipped, and that the result is to be drawn from an aggregatinon and consideration of all these matters. But the Supreme Court has never said, and in my humble judgment it never will say, that in order to justify and to validate the particular act of the legislature fixing the maximum rate upon particular articles of merchandise or the subjects of carriage, that they can, in its relation to other subject-matters of shipment, minimize the shipment on one article, by exaggerating the amount of charges on schedules on other articles. The underlying policy and inspiration of the Interstate Commerce Act itself is equity among all patrons of these public carriers. The carrier is prohibited from discriminating. He must be just alike to all comers, and in determining whether he deals justly and fairly and equitably with all patrons of the road, consideration must always be had in the relation of one article shipped to another. For instance, we could not say that because a man wants to ship a carload of cattfle from here to St. Louis that the car should be taken from here to St. Louis for a dollar a car, and then say as to a man who wanted to ship a half dozen cows or a half dozen sheep that they might take them for $10. That would be discrimination unquestionably among these shippers, and it cannot be that the law would uphold an act of the legislature that would justify discrimination in favor of one shipper as against the amount to be paid by the other, in order to ascertain this equation, in determining whether the railroad can do this business without a loss or not.

The serious question is presented by the objections to this bill on this preliminary hearing as to that feature of it that undertakes to restrain certain shippers who are made parties defendant with the officers of the state to this bill. Now, it is true that while this statute authorizes any shipper who is charged a greater

rate than the maximum fixed by the statute to maintain an action for damages against the carrier to recover the excess paid, and that the court by its judgment may treble the amount of the damages thus ascertained, it is true that the bills do not charge that any shippers, or particularly those who are designated as defendants in this case, are threatening to bring such suits. That, of course, could not be alleged, for the reason that this bill was filed as soon as the law became operative under the constitutional provisions of the statute when the act of the legislature would go in force. If bills can lie against them at all, it is upon the theory outlined with respect to the right to maintain a bill against the state officers. That they have a right to challenge the law on its face as soon as it becomes operative, in advance of any affirmative action taken by parties is not denied, in order to have it determined and that the railroad companies and the shippers may know what to depend upon.

Of course back of all this law and all this legislation, in regulating shipping rates, the parties really in interest whose rights are to be protected, are the shippers. The public policy of the state is predicated upon the rights of the shippers, and it is intended for their protection as patrons of the public servants, the railroad companies and common carriers. The shippers are the parties really in interest. The railroad commissioners, the attorney general and all the officers of the state and of the counties, in effect represent the rights and interests of the shippers because they are the only parties—they are the real parties whose rights and interests are to affected by this law. They have singled out a number of shippers along the lines of these roads and made them defendants, as representatives of a class,—of all shippers—and the allegation of the bill is simply that they will bring suits.

Now it might be that these shippers who were made defendants are to come in by answer and disclaim any purpose to bring such suits. It would be a question whether the injunction could still go against them or not, and in addition to all that, it is always competent for a court of equity in cases of this character, especially, to determine who shall pay the costs of such a proceeding. It might in the judgment of the court be unjust and inequitable before parties have brought suit or taken such affirmative action, to mulct them of the costs of this suit. Whether or not a court should render a decree against them, notwithstanding the fact that they should come in and disclaim any purpose to bring such suits and say that they would not bring them as charged in the bill, whether the court should go further or not is not necessary at this time to express any opinion. Without any purpose

whatever to criticise the representatives of the state, the respondents in this case who are here, it does seem to me that it is to the interest of all parties concerned, to the state, to the public and to these carriers, that this question of the validity of this act of 1905 ought to be determined at the earliest date possible, and to that end, that the case ought to be brought to an issue and put in shape so that these questions could be finally determined. For instance, right on the face of this act of the legislature there is a question raised here that the act is leveled against all individuals and corporations who may carry these articles affected by this act. When it comes to the section of the statute that authorizes the shipper to maintain an action and treble damages, it applies only to railroad companies and not to individuals who may be running a railroad, and therefore the contention is that on the face of the statute it is discriminatory. It discriminates against the railroad company in this respect by subjecting it to this liability when it does not subject an individual who may own a railroad and be carrying goods as a railroad to the same liability. Now there are two answers made to that in argument. One is that the bill does not aver on its face that there are individuals who are operating railroads in the state and who would be common carriers; and in the second place, that although the section of the statute referred to which subjects the railroads to trebled damages at the suit of any shipper applies only to railroad companies, that it is not infrequently the case that an act or a statute may be void in part and good in part, that the vicious part of it may be eliminated and that which is good may stand. It seems to me that if this objection to the statute is well taken, that that section discriminates against the railroad company and in favor of an individual carrier. The principle or rule invoked about the statute being good in part and bad in part does not apply to this sort of a case. The objection to this statute is that it discriminates. It subjects only one class of citizens to a liability and to a penalty without subjecting another citizen engaged in the same line of business and doing the same acts to the same sort of penalty, and therefore it is a discrimination on its face against one citizen and in favor of another, and all such statutes certainly run counter to the provisions of the Fourteenth Amendment because they are unequal in their provisions. Whether the facts that have been developed that there are no individuals in this state running railroads or performing the functions of a common carrier in this state, would have any effect on that statute is not necessary to be considered now, but as stated by the court at the hearing, it would seem to me that for the purpose of this preliminary hearing, the legislature which made the statute having mentioned indi-

viduals, the presumption ought to be directed to the legislative declaration that there are such individuals subject to the provisions of the statute, otherwise they would not have been enumerated by the legislature. If it is a legislative declaration that there was an interest to legislate with respect to individuals operating railroads who then owned them or who might hereafter operate railroads, it is not necessary to go further into a discussion of that matter.

The result is, it seems to me, that as this is a case which ultimately will have to be determined by the Supreme Court of the United States, that to avoid the delay consequent to waiting until the railroad commissioners take some affirmative action, wait until some shipper brings an action against the railroad, have these suits scattered all over the state, with the trouble and expense and delay that is consequent upon it to go to the Supreme Court through that sort of a channel, it is a very proper case where a court of equity ought to take hold of the matter and let these questions be settled at the earliest date possible because it has got to come to this conclusion at last, and delay will accomplish nothing, and in that view of the case, the temporary restraining order will be granted.

Counsel can draw the order. I have not read the temporary restraining order that was issued by Judge McPherson, but it will only be necessary to continue that in force, and the only remaining question is about the amount of bond that shall be given by these respective respondents. Of course so far as the defendants who represent the state in the matter are concerned they have no interest in the matter except such as is official. They have no pecuniary interest in the result and there could be no occasion to protect them except as to the matter of costs. The bond would inure practically for the benefit of any shippers who might be delayed in bringing their actions. Of course, it is entirely speculative what would be the probabilities of any injury to them by the delay consequent upon the pendency of this suit, and our conclusion was that a bond of $5,000 by each of these railroad companies would be sufficient. The amount of it, of course, would be increased or diminished as the acts might appear.

I will make the amount of the bond in each case $10,000, and of course if at any time a number of suits are brought by shippers, and that fact is brought to the attention of the court, the amount of bond can be increased at any time.

I will change the bond by making it inure to the benefit of the defendants or any of them or all such other parties who may becomes parties to this suit, so that if they want the benefit of the bond they can come in. You can make that change in the form of the bond as presented.

APPENDIX 9.

REPORT
OF
THE ATTORNEY-GENERAL
ON THE
MAXIMUM FREIGHT RATE LAW
TO THE
44th GENERAL ASSEMBLY
December 26, 1906.

MESSAGE.

January 18, 1907.

To the Senate and House of Representatives:

I have the honor to transmit to you the report of Attorney General Hadley, as to the maximum freight rate law litigation. This law was enacted by the 43rd General Assembly, but its enforcement was enjoined by the federal courts, until the validity of the measure could be determined. A great deal of evidence has been taken concerning the reasonableness of the rate fixed in the maximum freight rate law, and at my request the Attorney General prepared a report for your information, giving the salient point developed by the testimony.

In order that you may have the aid of these facts in your further consideration of the question of freight rates, send you this report, to be considered in connection with my recommendations on this subject, in my biennial message, and for such other action as you may deem proper and right.

Respectfully,
Jos. W. FOLK,
Governor.

REPORT.

LEGAL DEPARTMENT, STATE OF M.SSOURI.

December 26, 1906.

Hon. Joseph W. Folk, Governor of Missouri, Jefferson City, Mo.:

Dear Sir—I beg to acknowledge the receipt of your letter of

December 10th, asking as to the status of the litigation now pending in the United States Circuit Court for the Western Division of the Western District of the State of Missouri, concerning the maximum freight rate law enacted by the last General Assembly, and also for such salient facts as may have been developed by the testimony, in order that you may advise the incoming General Assembly of the condition of this litigation, and any other facts which may be of value in the enactment of further legislation.

An answer to this letter has been delayed by official engagements, which have necessitated my absence from the state for the last ten days. As you are aware, the act referred to fixed maximum freight rates upon grain, flour, lumber, salt, cement, live stock, agricultural implements, furniture and wagons. It became a law upon the 16th day of June, 1905, and immediately thereafter the eighteen railroads of the state instituted injunction suits in the United States Circuit Court for the Western Division of the State of Missouri, before John F. Philips, District Judge, and without notice or hearing to the state, a temporary restraining order was granted. The question of the issuance of a temporary injunction was argued at length by Mr. Sanford B. Ladd, who was retained as special counsel for the state, Mr. Kennish and myself, and by a number of legal representatives of the railroads. After taking the matter under advisement, the court granted a temporary injunction as prayed for. Considerable delay then followed in the making up of the issues in the case, and it was not until the latter part of 1905 that the reply of the railroads to the answers that had been filed by the state, was finally secured, and the case ready to proceed to a hearing. The railroads sought to have the case heard by Judge Philips and not by a Master, as has always been the custom in such litigation. This question was fully argued in February, 1906, before the court and, after some delay, a decision was rendered sustaining the contention of the state that the matter should be heard by a Master, and Honorable Frank L. Schofield of Hannibal, was appointed by the court to hear the testimony, as Special Master, and report as to the law and the facts in such cases as the state and the railroads might agree upon for trial. An agreement was entered into by which three roads, the Burlington, Missouri Pacific and the Wabash, were selected as those cases which would be tried first, these selections being, in my opinion, most advantageous to the state, as these roads are among, if not the best revenue producers in Missouri. Following the appointment of Judge Schofield, April 7th was set as the day that the taking of testimony would begin. At this time application was made by the railroads for a continuance for six months, that

time being asked as necessary in which to complete the investigation of their books before beginning the introduction of testimony. This application was denied, and the Master directed that the hearing of testimony begin on June 10, 1906. At that time, however, the examination of the books of the roads selected for trial, had not been completed, and the court granted a continuance until July 9th. The cases were again continued, in order to permit an examination of the books of account of the complainants, until September 7th, at which time the first hearing was begun in St. Louis. These hearings have proceeded, with occasional interruptions from time to time, up to the present, and the testimony in the Burlington and Wabash cases has now practically been completed. This is in brief, a statement of the various proceedings had in this litigation, and explains the present status thereof.

From an investigation of similar litigation in other states, I find that these cases have proceeded as rapidly as such litigation usually proceeds. The natural delays incident to cases of this kind, in which a large number of lawyers and large interests are involved, have not been overlooked by the attorneys for the railroad companies, and though the railroad companies are the complainants, they have displayed no special desire to secure a speedy determination of the questions involved in this litigation.

In order that you may be further advised in reference to the facts developed in this litigation, I beg to submit the following: The rates fixed by the act of 1905 upon the commodities mentioned, were about a 30 per cent reduction of the rates which were then being charged by the railroads in this state, with the exception of the rate upon live stock, which was over 35 per cent less than the rate then in existence. Previous to the enactment of this law, the rates that were being charged by the railroad companies were in many instances below the maximum rates fixed by the board of railroad and warehouse commissioners in 1904, and much lower than the rates fixed by the last maximum rate law which was enacted in this state in 1875.

It is the contention of the railroads in this case that to comply with the law of 1905 would result in the confiscation of their property, and a violation of the Fourteenth Amendment to the Federal Constitution, in that to carry freight at the rates fixed in this law would not give a return above operating expenses. The rates, of course, apply only to intra-state freight, but it is frankly admitted by the railroad companies that they would have no hesitation in complying with the provisions of this law were it not for the effect that these rates have upon interstate rates, in that it is a rule of railroad traffic that the interstate rate cannot be higher than the sum of the locals. It is not seriously contended by the railroad

companies but that they would get a fair return upon that portion of their property which could be said to be used for the handling of intra-state freight by observing the rates in question, were the cost of carrying State freight the same proportionately as the cost of carrying interstate freight. It is, however, the contention of the railroad companies that the cost of carrying the average ton mile of intra-state freight is from three to seven times as large as the cost of carrying the average ton mile of interstate freight. So that the determination of this case practically turns upon the correctness of this contention. I am satisfied, from the facts developed in this litigation, that this contention is untenable, and that the rates fixed by the act of 1905 are, with the possible exception of the rate upon live stock, entirely reasonable. It is important at the outset to know that the rates the railroads have been charging the people of Missouri for the carrying of freight are from 25 to 35 per cent higher than they are in the neighboring states of Illinois and Iowa, notwithstanding the fact that the density of population in Missouri is practically the same as it is in the state of Illinois, and almost twice as large as it is in the state of Iowa. This is so whether the calculation is made on the basis of the population per square mile or on the population per railroad mile. It is a general rule in railroad operation that the density of traffic corresponds, in a general way, with the density of population.

In explanation of these rates which have been charged the people of Missouri, it is contended by the railroads that the distribution of population is not as even in Missouri as it is in Illinois and Iowa, and that the expense of railroad construction and operation is greater in Missouri than in either of the two states named. I am satisfied that these contentions are, in a measure, correct, insofar as a comparison is made between the entire state of Missouri with the states of Illinois and Iowa. However, it is my opinion that the conditions existing north of the Missouri river are more favorable to the railroad companies, both from the standpoint of density of traffic and also cost of construction and operation than the average conditions existing in the states of Iowa and Illinois. But, even conceding the correctness of the contention of the railroads in these regards, it would certainly not justify rates in this state being from 25 to 35 per cent higher than in the states referred to. The marked contrast existing in the topographical and industrial conditions in the north half as compared with the south half of Missouri, might well justify the legislature in varying the maximum rates which should be charged in the two sections of the state, or in authorizing the board of railroad and warehouse commissioners to regulate rates in reference to the

difference in conditions affecting the expense and earnings in the operations of railroads.

The testimony taken in the Burlington case shows that in 1904, the Burlington railroad made upon that business, which it did in the state of Missouri, both state and interstate, a net profit of $5,273,817.84, and in 1905, it made a net profit on its Missouri business of $4,857,384.23. These figures show the net profits, after paying all operating expenses, taxes, and the setting aside of a considerable amount for the purpose of improvements and betterments. The profits in each of these years would pay a 20 per cent dividend upon a reasonable valuation of the actual physical property of the road in the state of Missouri. That is, according to the rate of profit enjoyed by the Burlington on the business that it did on its road in this state in the years 1904-5, it could pay for its system in Missouri in five years. In 1904 the average net earnings per mile of the Burlington railroad on its entire system was $2,347, while the net earnings per mile in that year upon the part of the road which is located in the state of Missouri was $5,-110.19. In 1905, the average net earnings per mile upon the entire system was $2,534.57, and the average net earnings per mile upon that portion of the road in the State of Missouri was $4,-253.41. Although less than 11 per cent of the mileage of the Burlington railroad is located in the State of Missouri, that mileage furnishes to the road over 20 per cent of its entire revenue. These figures are readily explained by a comparison of the freight rates fixed by the board of railroad and warehouse commissioners in 1904, which have generally been the rates charged by the railroads on mileage tariffs, and those in existence in Iowa and Illinois by order of the board of railroad and warehouse commissioners of those states; I cite you the following instances:

In Missouri, the maximum rate for carrying a car load of wheat 100 miles to market, is $60; in Iowa and Illinois, for the same car the same distance, it would cost $48. In Missouri, the maximum rate for carrying a car of stock 100 miles to market is $24; in Illinois the same car the same distance can be carried for $20. In Missouri, the maximum rate for a car of agricultural implements 100 miles is $34; in Iowa, the maximum rate for the same car the same distance is $18; in Missouri, the maximum rate for a car of lumber is $32; in Iowa $25. A corresponding difference exists upon other commodities, for other distances according to the schedule adopted by the railroad board in 1904, and the rates existing in the two states mentioned. The act of 1905 serves to equalize, in a general way, this marked disparity in rates.

Upon the intra-state business alone, the Burlington railroad would in 1904, had the rates fixed by the Act of 1905 been enforced,

have enjoyed a net profit of $511,343.93, and in 1905, a net profit of $647,501.66. Apportioning the property of the road between intra-state and interstate business, according to the volumes of the two traffics, and calculating the expense of the two kinds of traffics upon the same relative basis of cost, said profits in 1904 would have paid a 17.39 per cent dividend upon the investment, and in 1905, a 19.20 per cent dividend upon the investment. It is readily apparent, therefore, that unless the contention of the railroads, that it cost from three to seven times as much to carry the average ton mile intra-state freight, as it does to carry the average on mile of interstate freight, can be sustained, these cases must result in a decision against the railroads. To support their contention in this regard, the railroads have offered a large amount of expert testimony, although it is apparent from the evidence taken that this question is one which is capable of reasonably accurate mathematical computation. From an investigation made by the experts employed by the State, it is apparent that the revenue per ton mile on intra-state freight, is from two to five times higher than the revenue per ton mile on interstate freight, and that the profits in the state of Missouri enjoyed by the railroads from handling of intra-state freight, have been larger than the profits derived from the handling of interstate freight. In other words, more money proportionately has been made in the doing of state business, than has been made by the doings of interstate business. Further investigation and calculations from actual waybills is now in progress, which, it is believed, will demonstrate the correctness of this contention.

In the section of the act of 1905, fixing the maximum rates heretofore referred to, it is provided, that they shall be binding upon any person, corporation or partnership, engaged in the operation of any railroad. The penalty clause which provided for a penalty and forfeiture, applies only to corporations. This difference between the two sections, Judge Philips, declared in his opinion, rendered at the time of the granting of the temporary injunction, would render the act unconstitutional. While I do not agree with the correctness of this opinion, I think that this fact, together with other facts, to which I will refer, makes it advisable that further legislation in reference to this matter should be enacted by the next legislature.

As already stated, the rate fixed by the act of 1905, for the carrying of live stock, was over a 35 per cent reduction of the rates theretofore existing, and established a rate lower than in any contiguous state. It also fixed the rate lower for live stock than for a number of other articles of freight traffic of much less value, and on which the loss and risk incident to transportation is much

less. This reduction on the live stock rate was added to the bill by an amendment adopted by the senate, which body also eliminated, by amendment the rate upon class J, which includes coal, brick, sand, railroad ties and other fourth-class articles.

It is, therefore, my opinion that there should be adopted by this legislature a new maximum freight rate law which would make such changes in the live stock rate of the act of 1905, as would relieve the bill from any question of legality on account of the low rate upon live stock fixed by the act of 1905; that the penalty clause of the bill should be changed; that maximum rates should be established upon the articles enumerated in class J., and that such modifications should be made in the rates fixed by the act of 1905, upon those commodities, other than live stock, which might in the opinion of the legislature, assisted by the experts employed by the state in this litigation, seem advisable. The enactment of a law making these changes in the act of 1905, *would not affect the litigation now pending,* unless the railroad companies would by reason of such new enactment decide to abandon the litigation. I am also of the opinion that it would be advisable for the legislature to adopt a different classification of all articles of freight than that made in the act of 1875, which is incomplete and does not correspond with the existing classifications of the board of railroad and warehouse commissioners, the Interstate Commerce Commission, or of the railroads themselves. It would be well that all of these classifications should correspond, so far as injustice would not be accomplished thereby to any special class of shippers. I understand that some of the railroad companies are opposed to the enactment of a law amending the act of 1905. But the fact that the railroads do not want to have such a bill enacted, is certainly no reason why the legislature should not enact it. In addition to the questions existing in the litigation by reason of the conflict in testimony as to the correctness of the contention of increased cost of handling intra-state as compared with interstate freight, the railroads would, of course, desire to have remain in the litigation the questions in their favor created by the inequalities in the penalty clause and the rate upon live stock as compared with the rates fixed upon the other commodities therein named.

In addition to the results to be accomplished by further legislation in this direction, *there should be adopted, if practicable, a plan by which a determination of this question can, in the first instance, be kept in the courts of the state of Missouri, and if such a result is possible, it should be accomplished.* While I do not mean to be understood as saying that the Federal courts would be unfair to the state, yet I do say that if the state of Missouri

is a good enough place for the railroads to do business and to make money in, the courts of Missouri are good enough courts in which to litigate the question of the reasonableness of rate regulation adopted by the legislature of the state. And I am satisfied that, at least, a more speedy determination of this question can be had in the state than in the Federal courts. If such a law could be enacted, the railroads would, of course, retain their right of appeal to the Supreme Court of the United States upon the question as to whether the rates established were in conflict with the fourteenth amendment to the Federal constitution.

In conclusion, I desire to say that while the delay incident to these proceedings, from various causes, has been unsatisfactory, yet it must be remembered that such has been the experience of other states that have undertaken a contest for the securing of reasonable railroad freight rates. Particularly when it is considered that the railroads have for years fixed their rates for the carrying of freight in this state practically without let or hinderance, it is not surprising that they should resist in every way possible any effort by the state to deprive them of this privilege. At the beginning of this litigation, there was no person connected with official affairs in the state of Missouri, who was in possession of any actual information concerning the questions involved in this litigation. The work of preparation has consequently necessarily been burdensome and required time. In view, however, of the fact that we now know in a definite way something of the earnings and expenses incident to the railroad business in the state of Missouri, we have a definite working basis upon which to prosecute further efforts for the securing of reasonable freight rates to the people of this state. The history of these contests in other states is that they are not won except after years of effort and then only when the railroads are convinced that the representatives of the state cannot be defeated or discouraged either by delays or unsatisfactory results.

In fairness to the railroads, I desire, however, to say that the representatives of a number of the roads have expressed to me a willingness to make concessions in the matter of railroad freight rates and to co-operate with the representatives of the legislature and of other departments of the state governmen in devising a new bill which will secure substantial reductions to the people of the state and relieve the railroads from some of the burdens which they claim are imposed by the acts of 1905. I have at all times expressed my willingness to join in this effort, and I have directed the firm of Haskins & Sells, which has represented the state as expert accountants in this litigation, to give special attention to the reasonableness of the rates adopted on each of the separate classifi-

cations in the Act of 1905, and also as to what would be a reasonable rate upon those articles classified under class J., in order that the legislature might have the benefit of their investigation, in case it should deem it advisable to undertake the enactment of a new maximum freight rate law, for the purpose of making mutual concessions in order to avoid the uncertainties and delay incident to further litigation.

Respectfully submitted,

(Signed.) HERBERT S. HADLEY,

Attorney-General.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 326.

JOHN A. KNOTT, H. R. OGLESBY, AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, APPELLANTS,

vs.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

No. 334.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, APPELLANT,

vs.

JOHN A. KNOTT, H. R. OGLESBY, AND FRANK A. WIGHTMAN, RAILROAD AND WAREHOUSE COMMISSIONERS, AND ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, ET AL.

SUPPLEMENTAL BRIEF FOR THE CHICAGO, BURLINGTON AND QUINCY RAILROAD CO.

Criticism of the Accounts.

Some criticism is made of the accounts of the Chicago, Burlington and Quincy Railroad for the year ending June 1, 1908. There is no force in this when the record is understood.

(*a*) Mr. Sturgis, the general auditor of that company, had been examined and cross-examined before the master at great length, and inquiry had been made as to every detail of expenses and earnings for the years 1904 and 1905. Statements were submitted of the earnings and expenses for those years, with the details of nearly every part thereof. (Ev. Sturgis, Rec., 229-425; Crosby, Rec., 555-558, 578-604; Ex., 4-10, Rec., 1257-1273.)

The State expert admitted the correctness of the figures, claiming only, in one or two minor respects, that certain sums should not be credited to State earnings or charged as State expenses. (Cross-ex. Fisher, Rec., 826-846.)

The only substantial difference at that time between the parties was whether the original division of expenses should be upon the ton mile or revenue basis, and what, if any, extra cost there was in doing the State business, over the interstate. This was made plain by Mr. Sturgis, who prepared Exhibit 42, giving in detail a final statement (Rec., 1447-1458) clearly showing that after allowance was made for every correction claimed, the freight rates fixed by the act of 1905 were confiscatory if, as between State and interstate business, expenses were to be divided upon the revenue basis, and if it cost more to do the State than the interstate business.

(*b*) After the supplemental bills were filed in June, 1907, the State experts had every facility furnished and every courtesy extended, and every opportunity was given them to examine the books. Statements were furnished by the railroad company to the State which were verified by through examination of the books by the State experts; test periods were agreed upon between the parties and the State experts given all the time desired for investigation, (Findings 4, 5, 6, Rec., 5307-5308; Ev. Taliaferro, Rec., 4557-4558; Ev. Hamilton, Rec., 4634.) Such examination was actually made (Ev. Taliaferro, Rec., 4495-4499, 4525-4527), so that as to each and every item of the accounts the

State was fully posted and was familiar with the entire situation. It thus became wholly unnecessary to burden the court with more than a general statement. The details were immaterial, since general results were conceded. When the case closed, *by agreement of the parties* (Order, Rec., 174; Finding 14, Rec., 5311) two experts upon each side went over all of the evidence, facts, and figures, spending (Finding 14, Rec., 5312; Opinion, 5300) some days alone with the judge below. They furnished and filed with the court statements (Rec., 175-212) to which no exceptions were taken, and the figures in which were adopted in the court's finding.

When the judge below made his findings, he requested each party to call his attention to any mistake, error, or inaccuracy, giving thirty days for the purpose (Findings 17-20; Rec., 5315, 5327). The State refused to take advantage of this offer, and never made a suggestion of any error, inaccuracy, or mistake. Even the assignments of error called no attention thereto. An appeal was not taken until after an unsuccessful effort had been made in the State court to evade the decree entered below (State *ex rel. vs.* Williams, 221 Mo., 227).

The court below asked the State to submit a request for findings (Rec., 5305), to the end that every fact claimed by it might, if justified by the evidence, be made part of the record. This the State refused to do.

In June, 1905, the State refused to dispute a single fact claimed as to confiscation, and submitted the applications for temporary injunctions upon the cases as made by the eighteen roads. The State consented to nominal injunction bonds without sureties (Order, Rec., 19). In June, 1907, the State consented (Opinions, Rec., 3748-5330; Finding 6, Rec., 5329) to a temporary injunction as to the freight rates, under the act of 1907, and this without any further bond than that theretofore given in a nominal amount, without surety (Order, Rec., 61). This was after full investigation

had been had before the master, and indicated that so far as concerned the freight rates there was no hope of any successful showing that they were reasonable.

In June, 1907, the State defeated a temporary injunction (Rec., 61; Opinions, Rec., 3748-5330; Finding 6, Rec., 5308) as to the passenger rate, so as to be permitted to have it tested by actual experience. In June, 1908, the State (Rec., 114) obtained a further postponement to make further examination, agreeing, in consideration therefor, that the master should be discharged and the eighteen cases should be set for final hearing upon the merits before the court, beginning in October. The cases, upon final hearing, were called in their order, the trial of each to be completed before the next case was begun.

The St. Louis and San Francisco was the first case on the docket. Extended inquiry as to that road was then made, not only as to the state of its accounts for the entire year ending July 1, 1908, but to the quarterly divisions thereof (Rec., 3767-4650; Exhibits 2, 3, 8, 38, 55, 58, 59, and 73, Rec., 4790, 4804, 4898, 4931, 4969, 4977, 4980, and 5017.) Proof was made that the making of the 2-cent passenger rate in nowise increased the travel, elaborate details in figures and statistics, by way of comparison, being furnished. (Ev. Nay, Rec., 4456-4477; Stone, Rec., 4480-4487; Peabody, Rec., 4408-4447; Exhibits 38, 39, 40, 47, 52, and 59, Rec., 4931, 4933, 4934, 4960, 4964, and 4980.) It was shown that the expenses of doing business had increased very considerably with the last two or three years, while earnings had almost been at a standstill. (Ev. Eustis, Rec., 4367-4389; Bethard, Rec., 4077-4098; McPherson, Rec., 4276-4366; Peabody, Rec., 4404, 4448.) These witnesses produced statements showing in detail the facts to which they thus testified (Exhibits 5, 31, 32, 33, 34, 43, and 53, Rec., 4821, 4926, 4928, 4929, 4938, and 4964).

It was clearly shown that the reduction in the State rate had caused a great reduction in earnings, State and inter-

state (Exhibits 56, 58, Rec., 4970, 4977). Much expert evidence was offered to the effect that the expenses as between State and interstate business should be divided upon a revenue basis (Ev. Doddridge, Rec., 3815-3828; Gray, Rec., 3929-4034; Haile, Rec., 4035-4076; Bethard, Rec., 4099-4139; Whitenton, Rec., 4140-4166; Ellis, Rec., 4194-4275; McPherson, Rec., 4276-4366; Kendrick, Rec., 4390-4403).

It was also shown that it cost much more to do the State than the interstate business, not, as contended by the State, that the extra cost was confined to local as distinguished from State business (*id.*). Included in this proof of extra expenses were shown the results of actual experiments, demonstrating the fact beyond doubt. (Ev. Ellis, Rec., 4194-4295; Exhibits 11-28, Rec., 4905-4922; Ev. Kimbell, Rec., 4167-4177; Ex. 6, Rec., 4821; Ev. Peabody, Rec., 4404-4447; Exhibits 39-40, Rec., 4933-4934.) Proof was also made that the value of the property of the company was at least as much as that estimated by the State assessing board (Ev. Doddridge, Rec., 4487). When the case for the complainant was thus made, the State called two experts (Taliaferro, Rec., 4490-4597, and Hamilton, Rec., 4598-4637), who, upon cross-examination, admitted to be correct the statements of expenses and earnings, the only substantial difference between the parties being, according to their testimony, whether expenses as between State and interstate business should be divided upon the basis of revenue and the extent of the extra cost of doing the State business over the interstate.

There were then called the cases of the A., T. & S. F. (Rec., 4651-4685), C., R. I. & P. (Rec., 4686-4697), K. C. S. (Rec., 4698-4705), St. L. & H. (Rec., 4706-4711), M., K. & T. (Rec., 4713-4723), K. C., C. & S. (Rec., 4725-4722). In each of these instances the complainant called its auditor to prove its earnings and expenses, and the distribution thereof, offering no other proof in addition to that offered in the St. L. & S. F. case, except that in some in-

stances complainant called one witness as to the value of the property. As in the other cases, the State experts admitted the statements to be correct, and that the only difference was as to the method of dividing expenses between State and interstate business and the question of extra cost.

When the C., B. & &. case was reached the same course was adopted as to the additional evidence for and against it (Rec., 4743-4774).

Then followed the evidence in the case of the C. G. W. (Rec., 4775-4780). In the meantime, there were submitted, to abide the result of certain other cases, those of the St. L. & S. W. (Rec., 4687), Missouri Pacific (Rec., 4712), St. L., I. M. & S. (Rec., 4713), Wabash (Rec., 4737), Q., O. K. C. (Rec., 4723), St. J. & G. I. (Rec., 4724), C., M. & St. P. (Rec., 4724), C. & A. (Rec., 4724).

When the C., B. & Q. case was reached, Mr. Sturgis was called to submit certain general accounts which had been furnished to the State, and as to which it had examined the books of the company, having for the purpose all the time desired. As to the general figures in this statement, there is no dispute whatsoever. The State experts, upon cross-examination, admitted the same to be correct, and practically conceded that if the expenses were, as between State and interstate business, divided upon a revenue basis, both the freight and passenger rates were confiscatory. He referred in his cross-examination to the St. L. & S. F. case (Rec., 4767), where the same admissions were made as to that road (see Rec., 4573, 4579), saying that what he there said was applicable to the C., B. & Q.

It remains with counsel now, for the first time, to contend that the court here should, by suspicion, condemn the case and say that the expense account was in some mysterious way padded; that each part of the general statement should have been itemized, because of the presumption that the rates were reasonable and that the burden was upon the railroad company to prove each and every detail which entered into

the general summary submitted, although the same had been examined by its own experts. Such suspicion is not here warranted, nor can such rules as that be here invoked, because the statements had been in the possession of and by the State experts compared from the books of the company; they had for the purpose, all the time desired. Every facility was furnished and every courtesy extended. The period covered thereby was adopted below as sufficiently representative for the purposes of the cases, and finally, by consent of the parties, two experts from each side, with the judge below, went into the entire question and filed a return of their joint efforts, the figures in which accorded with those in the findings.

With these suggestions, we turn now to the earnings and expenses to see if they are the subject of criticism.

II.

Earnings.

The miscellaneous earnings for 1908 were in the general summary divided as between freight and passenger, State and interstate business.

As shown by Mr. Sturgis (Exhibit 98, Rec., 5090), the total earnings were:

Freight and miscellaneous	$8,927,630.81
Passenger	3,389,491.19
This made the total earnings	$12,317,122.00

It appears (Rec., 5091), that the miscellaneous was 7.24 per cent of all, or $891,759.63. Hence, the figures can be thus recast:

Freight, 65.24 per cent	$8,035,690.39
Passenger, 27.52 per cent	3,389,671.97
Miscellaneous (undivided) 7.24 per cent	891,759.63
Making a total of	$12,317,121.99

Now, turning to the State's expert's exhibits, 103, 104, and 105 (Rec., 5101-5105), summarized in Exhibit 105 (Rec., 5105), this is the result:

Freight	$8,035,229.51
Miscellaneous freight	161,379.41
Passenger	3,389,481.19
Mail, express, etc	731,021.89
This makes a total of	$12,317,112.00

This practically corresponds with findings 17 and 19 (Rec., 5315-5317, 5324). Finding 17 (Rec., 5315-5316) still further divides these figures, thus giving the percentages as to the C., B. & Q.:

(*a*) Freight earnings.		Per cent of all freight.	Per cent of all earnings.
Interstate freight	$6,554,699.87	78.75	52.40
State freight	1,580,529.64	19.28	12.83
Miscellaneous freight	161,379.49	1.97	1.31
(*b*) Passenger earnings.	Of all passenger.		
Interstate passenger	$1,777,788.27	43.15	14.43
State passenger	1,611,702.92	39.11	13.09
Mail, express, etc	731,021.89	17.74	5.94
	$12,317,122.08		

The joint report (Rec., 206) of the four experts selected (Rec., 174) by consent only gives the State freight and passenger proportion of revenue. These figures agree with the foregoing, for they show:

State freight (Rec., 201, 204)	$1,580,529.64
State passenger (Rec., 201, 204)	1,611,702.92

So the State experts (Rec., 4767, 4768) testified that there was no objection to the statement of the earnings. It may therefore be stated that the earnings as found are correct.

So far there had been no division of the miscellaneous, and mail and express, as between the state and interstate business.

The State's experts (Ex. 105, Rec., 5105), however, thus divided the entire earnings:

	Interstate.	State.
Freight	$6,454,699.87	$1,580,529.64
Miscellaneous freight..	129,636.08	31,743.33
Passenger	1,777,788.27	1,611,702.92
Mail, express, etc.....	383,420.98	347,600.91
	$8,745,545.20	$3,571,576.80
Total.....		$12,317,122.00

This coincides with the finding below, and gives exactly the same gross figures for the state freight and passenger business as were found (Rec., 5374) below and the same gross earnings, which correspond with the subdivided earnings as given by Mr. Sturgis in Exhibit 98.

The findings state (Rec., 5308) and the State expert (Taliaferro, Rec., 4767-4773) testified that there was no dispute as to the earnings. This ought to end any further inquiry in that direction.

III.

Expenses.

(*a*) An itemized account of all expenses is given by Mr. Sturgis in Exhibit 98 (Rec., 591), and the aggregate is $10,301,534.53. He divides this as between freight, passenger and miscellaneous, upon a revenue basis. The percentage as to the passenger is misprinted as 25.52, when the results show it should be 27.52, because the whole percentage of all the expenses equals the sum assigned as the total passenger expenses. Every other auditor divided, as

between freight and passenger business, by locating as nearly as possible to which of the classes the expenses belonged, and when it could not be located, by dividing upon a revenue basis.

The percentage of earnings and expenses is always greater in the case of passenger than freight. This is shown (Finding 18, Rec., 5317) in the other cases.

When the evidence was taken under the act of 1905, there was no question as to the passenger earnings. The C., B. & Q. made divisions upon a revenue basis, and it was then accepted as correct. To be consistent and have his former testimony understood, it was better to so divide the expense. This was acceptable to the State, whose experts had examined the books, had every facility offered, every courtesy extended, and all the time desired for the purpose. Moreover, the testimony shows that this method was much more favorable to the State than the other method of division adopted by the other roads (Finding 18, Rec., 5317). This was admitted by the State's expert (Rec., 4774-4775). According to the division made, these expenses were undivided as between State and interstate business (Ex. 98, Rec., 5091), thus:

Freight	$6,720,721.11
Passenger	2,834,982.29
Miscellaneous, undivided	745,831.13
Total	$10,301,534.53

The total expenses distributed in the same form by the State's expert (Exhibits 103, 104, Rec., 5102-5104) are:

Total freight expenses (Ex. 103, Rec., 5102)	$6,793,610.60
Total passenger (Ex. 104, Rec., 5104)	3,527,311.81
Total	$10,320,921.41

The insignificant difference between this total and that submitted by Mr. Sturgis is claimed to be made up by charging as against expenses certain rentals which also ought to be credited to the earnings; whereas, in the accounts of the railroads, the rentals paid and received were, so far as they would, permitted to balance and offset each other, so as not, to that extent, enter into the accounts. The Interstate Commerce Commission requires the accounts to be so kept. The State, however, through oversight, did not credit the earnings. The court, in its finding (Rec., 5324), added the net amount thereof. The State then attempted to further deduct from the expenses the net result of the division of the rentals upon a mileage basis, instead of the method in which they had been divided, no satisfactory reason being given therefor. The result was he deducted from gross freight and miscellaneous freight expenses $127,864.22, and from the gross passenger, mail and express expenses, $128,-736.67. When subdivided so as to apportion to State business the proper part thereof, the amount is so insignificant as not to affect the result. It may, therefore, be assumed that the court below was right in saying (Finding 6, Rec., 5309) that there was no difference between the parties as to the total amount of expenses.

The report of the four experts (Rec., 201-204), acting by consent, so showed.

(*b*) Suggestions based wholly upon suspicion are made that the percentage of expenses (including taxes) to earnings were too high, being for the C., B. & Q. (Finding 18, Rec., 5317) in freight 82.88 per cent, and passenger 85.60 per cent. As to all the roads whose cases were tried the percentages (*id.*) were:

Road.	Freight. *Per cent.*	Passenger. *Per cent.*
St. L. & S. F.	62.71	83.60
A., T. & S. F.	68.03	85.01
C., R. I. & P.	82.62	123.88
K. C. S.	67.07	89.97
St. L. & H.	86.80	104.64
M., K. & T.	68.24	85.56
C., B. & Q.	82.88	85.60
K. C., C. & S.	63.17	126.91
C., G. W.	81.04	105.79

Upon the entire system for 1908 the percentage of the C., B. & Q. was (Rec., 4762) 74 per cent; in Missouri in 1905 (Rec., 4748) it was about 66 per cent. The increases in percentage in 1908 are, since 1905, not over 20 per cent. When the facts were understood there was nothing abnormal about this. The reason for the increase is said by Mr. Sturgis to be accounted for by the natural increase of cost of material and labor, the fact that there had not been a corresponding increase of earnings, and because the Interstate Commerce Commission made some new requirements as to charging certain things to expenses. Nearly all of this increase in percentage as to the passenger business is accounted for in Missouri because the rates in question decreased state passenger business (Finding 14, Rec., 5313) $394,878.77, and interstate (*id.*) $261,566.41, a total of $656,445.21, about twenty-four per cent of the gross state passenger earnings. Ordinary expenses increased very greatly (Ev. McPherson, Rec., 4276-4360; Bethard, Rec., 4077-4098; Peabody, Exhibits, Rec., 4404-4448). The percentage will increase very rapidly if the earnings decrease by the State's lowering the rate, as was the case here, and the expenses in the meantime increase. Here the percentage increased 20 per cent in four years (Rec., 4753). The State's expert found no criticism of any item in the amount of the expense, though the closest attention had been given thereto and a full investigation had. In the supple-

mental brief an estimate is made by counsel that 75 per cent would be fair. As to passenger business an ingenious argument fixes it as 74 per cent, though the lowest percentage in Missouri was (Finding 18, Rec., 5313) in the case of the St. L. & S. F., 83.61 per cent. But if the expenses were charged at percentages 25 per cent less for freight and at 74, being 11.56 per cent less for passenger, it would not change the result. This is readily seen by taking from the deficit found a sum equal to these differences in percentages. Thus, 25 per cent of the State freight earnings, $1,580,529.64, is $395,132.41. The deficit found in State freight is the net loss of $338,099.20, plus the return to which the railroad is entitled, $409,325.04, of a total of $747,424.24. From this sum, the 25 per cent, $395,132.41, if deducted, would still leave a deficit of $342,291.83. So, 11.56 per cent difference in State passenger percentages applied to the earnings, $1,611,702.92, equals $187,279.87, while the net loss of $33,450.99 plus the return, $417,620.02, to which the road was entitled, equals $451,071.01. From this, the 11.56 per cent, or $187,279.87, if deducted, would still leave a deficit of $263,781.14. Indeed, if the percentage of expenses to earnings be arbitrarily fixed in the case of freight at 37 per cent, and in the case of passenger at 65 per cent, unheard-of figures, and the expenses as found by the court or stated by Mr. Sturgis be rejected, the result would still show confiscation. Making up from the findings (Rec., 5324) a statement along this line, this is the result:

	Freight.	Passenger.
State earnings	$1,580,529.64	$1,611,746.71
Add credit balance of taxes and rentals	2,487.99	2,798.50
Total state earnings..	$1,583,017.63	$1,614,545.21
For expenses deduct 37 per cent for freight and 65 per cent for passenger....	585,716.52	1,049,454.38
Leaves	997,301.11	565,090.83

Less diminution in earnings	112,533.71	
	884,767.40	
Extra cost	484,129.29	158,205.70
	400,638.11	406,885.13
Return to which road is entitled	409,325.04	417,620.02
Deficit	$8,686.93	$10,734.89

In the supplemental brief counsel say that the percentages should be arbitrarily fixed at 75. Fixing the expenses on this basis, the result would be:

	Freight.	Passenger.
State earnings	$1,580,529.64	$1,611,702.92
Add credit balance of taxes and rentals	2,487.99	2,798.50
Making	$1,583,017.63	$1,614,545.21
Deducting 75 per cent claimed by the State as expenses	1,187,263.23	1,210,908.91
Leaving	$395,754.40	$403,536.30
Less diminution in earnings	112,533.71	
Leaving	$283,220.69	
Extra cost deducted	484,129.29	158,205.70
Leaves loss	$200,908.60	
Leaves gain		$245,330.60
Net return to which the company was entitled	409,325.04	417,620.02
Total loss	$610,233.64	$172,289.42

IV.

Accounts Stated.

(*a*) The court below (Finding 19) found the ultimate facts to be:

	Freight.	Passenger.
State earnings.....	$1,580,529.64	$1,611,702.92
State expenses	1,324,453.83	1,489,746.71
	$256,075.81	$121,956.21
Crediting net result of taxes and rentals.....	2,487.99	2,798.50
	$258,763.80	$124,754.71
Diminution in earnings.	112,533.71	
Net earnings.....	$146,030.09	
Extra cost.....	484,129.29	158,205.70
Loss.....	$338,099.20	$33,450.99
Net 6 per cent return to which company was entitled	$409,325.04	$417,620.02

The State passenger expense thus found is $1,489,746.71, as against $1,348,034.08, the revenue proportion claimed by (Ex. 98) Mr. Sturgis, and conceded (Rec., 4767-4763) by the State's expert. This change was adopted (Rec., 5315-5317) from the figures (Rec., 201-206) of the joint experts, who, by consent (Rec., 174) spent days with the court going over all figures and filed a report so giving the figures. The reason for the change was not disclosed. Possibly there was some reduction in the total passenger business, by throwing some items into miscellaneous passenger, thus increasing the percentage of State passenger from about 47.55 (Ex. 98, Rec., 5091) to about 50 per cent. Possibly it was a mistake.

Anyhow, the figures must be taken to be correct. It was found by an *agreed* tribunal and the proceedings before it are not preserved. Moreover, the court asked for corrections of any error or mistake, giving thirty days for the purpose (Finding 17, Rec., 5315; Finding 20, Rec., 5327). No suggestion of error was made till the brief was filed here.

But stating the account as to the passenger business upon the division made by Mr. Sturgis (Rec., 4747; Ex. 98, Rec. 5091) and agreed to by the State (Rec., 4767-4773), omitting the figures of the four experts, adopted by the court, this is the result:

Earnings	$1,611,702.92
Expenses deducted	1,348,034.08
Leaves	$263,668.84
Crediting net result of taxes and earnings	2,798.50
Leaves	$266,467.34
Extra cost deducted	158,205.70
Net earnings	$108,261.64
Net 6 per cent return to which company is entitled	417,620.02
Loss	$309,358.38

V.

The Value Was Properly Found.

The question of finding, together with the finding, and the evidence in support thereof has already been considered. (Original Br., 59-82.) In the supplemental brief it is contended that the valuation is excessive because it includes the value of the franchises. As a matter of fact, it

is not included, although, if it had any value, there should have been allowance therefor. The particular point made is this: The valuation was fixed by simply adopting the value estimated by the State Board, and under this law this included the franchise value. The Missouri law requires certain specific property to be listed and assessed by the State Board, and then provides for a lump assessment "of all other property."

Counsel erroneously assume that this includes the franchise, the value of which should now be fixed and deducted.

The whole argument proceeds upon the erroneous idea that the court below simply adopted the value as fixed by the State Board. This is not true, in point of fact, because the court in Finding 11 said:

> "But, aside and apart from the valuations thus fixed by the State Board, these findings are that upon the whole evidence, said properties are at least of the values above fixed."

Had a franchise value existed, it would, as already seen, have been a proper subject of consideration. There was no franchise value for a steam railroad organized under the laws of another State and permitted to do business in Missouri, to be there taxed. The proof of witnesses as to value was wholly independent of any such consideration.

Respectfully submitted,

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